74-1532

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. A-812

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 4, 1975

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IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, FRANCIS M. COCKE, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 7, 1974.

OPINION AND JUDGMENTS BELOW

The judgment of the Court of Appeals

for the Ninth Circuit affirming without opinion the judgment and order of the United States District Court, is in the record supplied herewith. The Opinion of the District Court, not yet reported, also appears in such record.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on October 7, 1974. A timely Petition for Rehearing was denied January 8, 1975. An Application for Extension of Time in which to file Petition for Writ of Certiorari was granted by William J. Brennan, Jr., Associate Justice, on the 10th day of April, 1975. The Extension of Time for the Filing of Petition runs to and includes June 7, 1975. This Court's jurisdiction is invoked under 42 U.S.C. Section 1984 and 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether a pro se complaint predicated under the Civil Rights Act, 42 U.S.C. 1981 et seq., should be dismissed with prejudice where the principal relief sought is review and vacation of certain state court orders which constitute denials of due process, because the state courts lacked subject matter jurisdiction over the actions.

2. Whether judicial immunity insulates state judges against suits which seek principally equitable relief under 42 U.S.C 1983, where the state courts lacked subject matter jurisdiction over the actions.

STATUTORY PROVISIONS INVOLVED

The United States Code, Title 42:

Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Section 1983. Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985(3). If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons

conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Section 1986. Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow,

then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

Section 1988. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and dispostion of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

The United States Code, Title 28:

Section 1331(a). The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Section 1343. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any

person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

This action arose out of disputes over the terms and conditions contained in a written escrow agreement for the sale and purchase of land.

Certain land owned by petitioner (F. M. Cocke) and other land held in trust was agreed to be sold under the terms of the agreement to respondent JAMES STEWART COMPANY or its nominee, the respondents HORNE (hereinafter referred to as "Buyers"). Respondent TRANSAMERICA TITLE assumed the

duties of escrow agent and title insurer. After a series of events concerning the escrow terms and conditions, including disputes regarding payment instructions, and disputes as to the identity of parcels excepted from the sale and refusals to execute documents, the Buyers brought an action for specific performance of the agreement against only the named Sellers, F. M. Cocke and Joan H. Cocke (divorced). Joan Cocke is life beneficiary of the trust. James Stewart Co. vs. Cocke, Civil No. C-222472 (Maricopa County, Arizona, Superior Court, filed April 22, 1969). Transamerica has never been joined in Buyers' action.

Along with his answer to Buyers' complaint, F. M. Cocke brought an affirmative action jointly as well as severally against all three of the other parties to the agreement. On motion by Transamerica and over F. M. Cocke's continued objections, the trial court judge severed this action into three separate actions. Following separate and independent proceedings the judge eventually entered separate and independent judgments against F. M. Cocke and in favor of each of the other parties (R. 72, 75, 78 and 83). Each of these judgments altered the agreement.

The altered agreement is sought to be enforced by the Second Amended Judgment entered in favor of the Buyers on September 27, 1972 (R. 83), and by the Order Granting Writ of Assistance and the Writ itself (R. 105, 111), both issued October 31, 1973 under that judgment and allegedly pursuant thereto. No execution to enforce the altered agreement was issued under either the Transamerica or Joan Cocke judgment.

The alteration to the escrow agreement made by the judgment of September 27, 1972,

which in effect deleted its cancellation provisions, was accomplished in the following manner.

The escrow agreement (R. 43, 54), provided that Buyer was to pay, as the first annual installment on the mortgages, $64,000 on January 2, 1969. As provided for in the agreement by its cancellation paragraphs 16, 17 and 18 (R. 48), on March 6, 1969 escrow agent Transamerica gave written notice to Buyer that to avoid cancellation it must comply by March 19, 1969 (R. 63).

The September 27, 1972 judgment "modified" such 13-day period of grace by adding thereto some four years and eight months, allowing compliance by plaintiff Buyers by November 27, 1973, one year after expiration of the 60-day period for appeal.

The last three paragraphs of the September 27, 1972 judgment (R. 91, 92) are quoted here. They establish that the judgment fundamentally altered the escrow agreement, and also that the judgment was on its face patently a conditional judgment, and merely interlocutory.

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all

> obligations necessary in accordance with the contract between the parties to convey the subject property;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the plaintiffs' compliance with the terms of said contract as modified hereby.

(emphasis added)

In the next to last paragraph the ordered performance by F. M. Cocke is conditioned upon compliance by plaintiff Buyers with the terms of the original contract of October 9, 1968. In the last paragraph the force and effect of the September 27, 1972 judgment on petitioner's interest in and to the title to the subject property is specifically subjected to, or conditioned on, the plaintiff Buyers' compliance with the terms of the contract "as modified hereby."

It is well settled that a judgment which conditions its force and effect on the performance of certain acts to be done in the future by the parties, as here, remains without force or effect unless and until the conditions are fulfilled. Federal Land Bank of Louisville, Ky., v. Roney, 139 F.2d 175 (7th Cir. 1944), cert. den., 322

U.S. 753, rehearing denied, 323 U.S. 810, held that:

> * * *A judgment which will not become effective unless certain conditions are complied with, or which may be defeated or amended by performance of a condition subsequent, is no bar to a second action on the same subject matter unless it has become absolute by a performance of the conditions in the one case, or failure to perform in the other* * *.

But the fulfillment of the condition specified by the judgment in its last paragraph is itself conditioned on the asserted power or jurisdiction of the court to "modify" the agreement by allowing the extra four years and eight months for the Buyers to comply, which power or jurisdiction it did not and does not have. The relief of alteration of the escrow agreement was not relief which could be granted. Goodman v. Newzona Investment Co., 101 Ariz. 470, 421 P.2d 318, 320 (1967).

After the rendition of this judgment, F. M. Cocke made a Motion To Vacate on the ground of lack of subject matter jurisdiction, which was denied. The Arizona Court of Appeals dismissed the subsequent appeal from the September, 1972 judgment and from the denial of said motion to vacate, on the stated grounds that the appeal was untimely.

F. M. Cocke then filed a Motion For Findings of Grounds upon which the appeal was held to be untimely. He sought a definite ruling as to whether the untimeliness was based (i) on Buyers' claim that the Motion To Vacate was not a proper motion to alter or amend under Rule 59(e) (16 ARS Rule

59(1)), and therefore did not extend the time for appeal, or (ii) on the plain fact, called to the court's attention, that the judgment was conditional. His Motion For Findings was denied.

Thus, the avenue of state court appellate review was effectively impeded or obstructed by unprecedential opinions regarding Rule 59, see Theodoropoulos v. Thompson-Starret Co., 418 F.2d 350, 353 (2nd Cir. 1969), cert. den. 398 U.S. 905, and the finality of judgments. Reed v. Frey, 10 Ariz. App. 292, 458 P.2d 386, 388, 389 (1969), and Burney v. Lee, 57 Ariz. 41, 110 P.2d 554, 556, 557 (1941).

On or about January 14, 1974, F. M. Cocke commenced the instant action against the persons who were parties in his original state action, as well as their attorneys and the state court judges who entered orders and judgments in connection with the various separate actions into which his original state action was split. The federal action is predicated under the Civil Rights Act, 42 U.S.C. Section 1981, et seq (1970). Jurisdiction is predicated on the provisions of 28 U.S.C. Sections 1331 and 1343 (1970).

The action seeks to review and vacate the state court proceedings and judgments heretofore described.

As set forth in the complaint, petitioner seeks relief from the three state court judgments, and the orders issued in execution under one of them, on the grounds that these judgments and orders:

(1) fundamentally alter, and would enforce as so altered, the four-part escrow agreement for the sale and purchase of land;

(2) were based on the asserted power of the state court to bind by judgment a real party in interest, and thus an indispensable party, but not joined in the action, resulting from the state court's splitting of petitioner's affirmative action to enforce the indivisible contract into three separate and independent actions, with separate and independent proceedings and judgments; and

(3) were entered without findings on undisputed documentary evidence presented, which evidence shows that the actual agreement entered into was repudiated, or cancelled under its own specific cnacellation provisions, before the litigation over it began.

It is petitioner's position that these judgments and orders were entered without jurisdiction in the court over the subject matter, on each of the above three grounds, which are designated in the complaint (R. 27-33) as ALTERATION OF CONTRACTS, INDISPENSABLE PARTIES, and WANT OF FINDINGS.

The defendants filed motions to dismiss or for summary judgment and by memorandum and order dated March 4, 1974, these motions in part were granted. While the motions to dismiss for lack of subject matter jurisdiction and res judicata were denied, the motions of all defendants to dismiss for failure to state a claim and of the judges for dismissal on the ground of judicial immunity were granted. The Court of Appeals affirmed on the basis of failure to state a claim upon which relief can be granted.

In later developments in state court, in an attempt to cure the ineffectiveness of their conditional judgment, the Buyers on September 30, 1974 obtained a further order from the same judge (copy added to

record supplied) which found that the above condition specified by the last paragraph of the September 27, 1972 judgment had been fulfilled, and stated at its page 5, line 7:

> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the closing of Escrow No. 02013111-7 on December 20, 1973 by the TITLE INSURANCE COMPANY OF MINNESOTA pursuant to the Contract and Escrow Instructions entered into on October 9, 1968, as modified by the Judgment entered and filed herein on September 27, 1972 and by Order of this Court on October 31, 1973, and pursuant to the Writ of Assistance issued by this Court on October 31, 1973 is approved and confirmed. . . .

There has never been any finding or order concerning Buyers' compliance with the original contract as made by its parties, so as to fulfill the condition specified by the next to the last paragraph of the judgment.

It appears that the September 30, 1974 order confirmed what was already shown on the face of the earlier record — that the judgment entered September 27, 1972 and the Order Granting Writ of October 31, 1973 were not within the jurisdiction of the court.

REASONS FOR GRANTING THE WRIT

Fairly comprised in the Questions Presented For Review are the following unsettled questions of federal law which appear to merit consideration and settlement by this Court under Supreme Court Rule 19(1)(b).

COPY BOU

1. Whether the Civil Rights Act, 42 U.S.C. Sections 1981-1988 permits a federal court to review state court judgments entered in violation of petitioner's right to due process of law.

The lower courts are not in accord as to the merits of this contention. Compare Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969), cert. den. 397 U.S. 1065 (1970) (no jurisdiction to review state court judgment), with Concerned Consumers League v. O'Neill, 371 F.Supp. 644 (E.D. Wisc. 1974) (jurisdiction to review state court judgment).

The Civil Rights Act is plainly intended, among other things, to secure the right to due process of law in the courts to all persons.

In Truax v. Corrigan, 257 U.S. 312, 334 (1921), quoting and following Barbier v. Connelly, 113 U.S. 27, 31 (1885), this Court said:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, . . .that all persons. . .should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; . . .

As here pointed out, the 14th Amendment intended that with respect to access to the courts of the country, for the prevention and redress of wrongs and the enforcement

of contracts, there should be but one class of persons: "all persons".

Likewise, by 42 U.S.C. Section 1981 Congress secured the right to make and enforce contracts, and to due process of law in the courts (by specifying what constitutes such due process), to all persons within the jurisdiction of the United States, so forming but a single class, all members of which have these rights, as intended by the 14th Amendment.

In Cohen v. Norris (9th Cir. 1962), 300 F.2d 24, 29, the court said, referring to Monroe v. Pape, 365 U.S. 167 (1961), and Title 42 U.S.C.:

> In our view Monroe v. Pape announces the rule that an allegation of a purpose to discriminate or a purpose to deprive one of a federal right, is not essential to the statement of a claim under Section 1983 predicated on an alleged violation of the due process clause of the Fourteenth Amendment.

Under this decision, an allegation of discrimination, class-based or otherwise, is not necessary to state a claim under the due process clause.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 15 (1907), quoting its earlier case Scott v. McNeal, 154 U.S. 34, 46 (1894), this Court said:

> No judgment of a court is due process of law, if rendered without the jurisdiction in the court, . . .

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 368, 369 (1936), the Court said:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

The emasculation of these noble tenets by the doctrine of res judicata and so-called principles of federalism should not be countenanced by this Court. The guidelines in the area of civil litigation should be set down plainly by this Court for the lower courts.

2. At least with respect to equitable relief, the doctrine of judicial immunity should not restrict actions under the Civil Rights Act.

The cases are not in accord with this basic proposition. Compare Kinney v. Lenon, 447 F.2d 596 (9th Cir. 1971); Blouin v. Dembitz, 367 F.Supp. 415 (S.D.N.Y. 1973), affirmed 489 F.2d 488 (2d Cir. 1974) (immunity recognized), with Jacobson v. Schaefer, 441 F.2d 127 (7th Cir. 1971); White v. Flemming, 374 F.Supp. 267 (E.D. Wisc. 1974); Mills v. Larson, 56 F.R.D. 63 (W.D. Pa. 1972) (absence of immunity recognized where equitable relief sought).

In O'Shea v. Littleton, 38 L.Ed.2d 674, 687, 688, 94 S.Ct. 669, 414 U.S. 488, 503 (1974), the Court said:

> Whatever may be the case with respect to civil liability generally,

> see Pierson v. Ray, 386 U.S. 547, 18 L.ed.2d 288, 87 S.Ct. 1213 (1967), or civil liability for willful corruption, see Alzua v. Johnson, 231 U.S. 106, 110-111, 58 L.Ed. 142, 34 S.Ct. 27 (1913); Bradley v. Fisher, 13 Wall. 335, 347, 350, 354, 20 L.Ed. 646 (1872), we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. . . .

Bradley v. Fisher, 13 Wall. 351, 352, and Pierson v. Ray, 386 U.S. 553, 554, 555, which cited and followed it, held that where the court is without jurisdiction over the subject matter, the judge has no immunity from civil liability, as also held in Lucarell v. McNair (6th Cir. 1972), 453 F.2d 836. Alzua v. Johnson specified judicial acts "within the limits of his legal powers and jurisdiction" as a condition to the immunity of the judge. In Bradley v. Fisher, the Court said at 13 Wall. 351, 352:

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

In Lucarell v. McNair, the Sixth Circuit stated:

> Turning to the question of McNair's asserted immunity, it is true that as Referee and Administrative Officer of the Juvenile Court of Trumbull County, McNair was entitled to the full reach of the doctrine of judicial or, in this case, quasi-judicial immunity, and that the doctrine is applicable to actions instituted pursuant to Section 1983. Nevertheless, the doctrine is not without bounds. Some time ago the Sixth Circuit stated its views as to the limits of the protection thus afforded. In Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932), we indicated the view that a judge loses all immunity when he acts in absence of all jurisdiction. This rule was discussed at some length in the more recent case of Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970). See also Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646 (1871) (453 F.2d at 838).

As pointed out in another Court of Appeals' case, Hamilton v. Nakai, 453 F.2d 152, 156 (1972), cert. den. 406 U.S. 945:

> The Supreme Court long ago established the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter:
>
> > "Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the

> power to enforce such judgment or decree. (Citations omitted.)
>
> "Express determination of this court is, that the jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied. Consequently, a writ of error will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution of a suit in a court of record. (Citations omitted.)
>
> "Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution." (Emphasis added.) Riggs v. Johnson County, 1867, 73 (6 Wall.) U.S. 166, 187, 18 L.Ed. 768.

It appears that if a court is without power or jurisdiction to grant the relief sought, it is without jurisdiction over the subject matter.

And it therefore appears that where a judge in granting relief sought by one party has deprived the opposing party of a right, privilege or immunity secured by the federal constitution and laws, the much-debated question whether Congress intended by the civil rights acts to abolish the common law immunity of judges becomes moot under the doctrine of Bradley v. Fisher, unless such deprivation be within the power or jurisdiction of the court and can be enforced by due process against the opposing party. Without

the power to enforce such deprivation, by due process, the court is without jurisdiction over the subject matter, and the judge is therefore without immunity.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Ninth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
(Two Volumes)

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FRANCIS M. COCKE, Plaintiff
1320 South Priest Road
Tempe, Arizona 85281
(602) 967-0734

In propria persona

Filed:
January 14, 1974

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FRANCIS M. COCKE,)
)
Plaintiff,)
)
vs.) CIV 74-20
) PHX WPC
IRWIN S. CANTOR, EINO M.)
JACOBSON, FRANCIS J. DONO-)
FRIO, WALLACE O. TANNER,) COMPLAINT FOR
HUBERT KELLY, STEVEN H.) RELIEF FROM
SCHNEIDER, LORETTA S.) STATE COURT
WHITNEY, POWELL B. GILLEN-) JUDGMENTS AND
WATER, TRANSAMERICA TITLE) ORDERS ENTERED
INSURANCE COMPANY, TITLE) WITHOUT JURIS-
INSURANCE COMPANY OF MINN-) DICTION, AND
ESOTA, JAMES STEWART COM-) FOR INJUNCTION
PANY and M. SETH HORNE and) AND DAMAGES
MAURINE D. HORNE, his wife,)
JOAN H. COCKE, and ARLEIGH)
H. BURTON,)
)
Defendants.)
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I.

PRELIMINARY STATEMENT OF PLAINTIFF'S CAUSE OF ACTION

On October 9, 1968, plaintiff F. M. ocke and Joan H. Cocke (divorced) as Sellers ntered into a written agreement with James tewart Company or its nominees as Buyers, or the sale and purchase of two parcels of nd under the terms set forth in written scrow instructions to Transamerica Title nsurance Company of Arizona, as Escrow gent and Title Insurer. Inasmuch as Trans- erica remains unwilling to issue its title olicies and close the escrow in accordance th new demands [2] made by Buyers, as ell as unwilling to return Sellers' deeds ollowing repudiation or cancellation of the scrow agreement, there has been no transfer title or change in possession under its erms. Title to an undivided half-interest Parcel 1 was and is held by First Nation- Bank of Arizona as trustee, and its addi- ional escrow instructions were deposited nto escrow on or about October 25, 1968, long with its deed, and were accepted by ll parties as part of the escrow instruc- ions agreed to as constituting the terms deposit of Sellers' three deeds. Joan H. ocke is life tenant of the trust. A copy the agreement and of the trustee Bank's dditional instructions are attached hereto s Exhibit A. The fine print escrow in- tructions on the back of Transamerica's rinted escrow form have been retyped to ore legible size. F. M. Cocke's deed to is undivided half-interest in Parcel 1 and is deed to his Parcel 2, copies of which re attached as Exhibit B, were deposited nto escrow by the broker on or about ecember 31, 1968, following a survey to etermine the exact metes and bounds of ach of the two Parcels.

Following the deposit of the trustee Bank's deed, Joan H. Cocke, James Stewart Company with its nominees M. Seth Horne and Maurine D. Horne as Buyers, and Transamerica, attempted by joint and several activities to bring about substantive alterations in the escrow instructions, and joined in concerted attempts to mislead and to coerce F. M. Cocke into submitting to such alterations. Each of such three parties in a separate suit in Civil Case No. C-222472 in Maricopa County Superior Court sought and obtained through an attorney at law the entry of a separate judgment and decree against F. M. Cocke. Each of these judgments in intent, substance and effect does unlawfully alter or delete at least one of the controlling terms of such escrow instructions, without jurisdiction in the court. The entry of such judgment [3] has deprived F. M. Cocke of a right, privilege or immunity secured to him by the federal constitution and laws, in furtherance of the concerted attempts by such other three parties to mislead and to coerce him into submitting to such alterations.

Subsequently, the state trial court judge and two appellate court judges entered orders in aid of carrying such unlawful alterations into effect. By the entry of each such order the judge has deprived F. M. Cocke of a right, privilege or immunity secured to him by the federal constitution and laws, in furtherance of such concerted attempts to mislead and to coerce him into submitting to the alterations. By wrongfully using the coercive power of the State of Arizona in aid of carrying such unlawful alterations into effect, each of such judges in furtherance of such concerted attempts has joined in an attempt, by unlawful threat of force to be applied under color of official right, to extort from F. M. Cocke his consent to such unlawful alterations, so depriving him

of a right, privilege or immunity secured to him by the federal constitution and laws, and obstructing the due course of justice in the courts of the State of Arizona.

Under pretense and color of state law and authority, such other parties to the agreement, their attorneys at law, and the three judges by joint and several action with discriminatory intent and purpose have subjected or caused to be subjected plaintiff F. M. Cocke to the deprivation of equal rights, privileges and immunities secured by the constitution and laws of the United States to a citizen thereof, including deprivation of his right to like access to the courts of the State of Arizona for the protection of property, the prevention and redress of wrongs, and the enforcement of contracts. Plaintiff has been deprived of his civil rights to equal protection of the laws and due process of law guaranteed by the 14th Amendment to the federal [4] constitution. By such deprivations plaintiff has been damaged by way of harassment, extra expense, the direct taking of his time, and delay in making higher and better use of his land.

II.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1331, since federal questions are involved in this action, and under 28 U.S.C. §1343, since plaintiff's rights, privileges and immunities under the laws and Constitution of the United States have been denied under color of state law. Plaintiff's cause of action arises under such laws and Constitution and under the equal protection and due process clauses of the 14th Amendment. Statutory foundation

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for plaintiff's suit may be found in 42 U.S.C. §1981, 1982 and 1983, since defendants' conduct denies plaintiff's federal statutory and constitutional rights, and 42 U.S.C §1985, since defendants' joint conduct amounts to conspiracy, and 42 U.S.C. §1986, since each of the defendants neglected or refused to prevent the offending conspiratorial conduct, and 42 U.S.C. §1988, with respect to proceedings in vindication of civil rights.

III.

THE PLAINTIFF

Plaintiff F. M. Cocke is and has been for more than sixty-five years a citizen of the United States and a resident of Maricopa County, and is and has been for more than twenty-five years the owner of Parcel 2, and the owner of an undivided half-interest in Parcel 1, and the farmer of both parcels.

The duties assumed by F. M. Cocke under the agreement and escrow instructions, as spelled out on page 1 and by paragraph 1 of the fine print, were to deposit good and sufficient deeds into escrow and to sign the mortgage releases when prepared and delivered into escrow by Buyers. These things he timely did. [5]

Fine print paragraph 14 places on the Escrow Agent, not on F. M. Cocke, the duty to close the escrow "when these instructions have been complied with." The quoted clause includes compliance by the Buyers and Transamerica as escrow agent and title insurer as well as by F. M. Cocke. On March 10, 1969, following Buyers' delivery into escrow of a number of new written demands, the escrow agent formally notified Sellers by mail that Buyers had done everything required

of them to close the escrow. However on November 27, 1972, Transamerica, Hubert Kelly for the Buyers, and Loretta Whitney for Joan H. Cocke, entered into a written agreement that Buyers had not yet complied with the October 9, 1968, agreement, and would deposit additional funds into escrow to cover the deficiency. The judgment in favor of Buyers, September 27, 1972, assessed more than $47,000 in damages against F. M. Cocke on Buyers' claim that he was the one who had delayed close of escrow. The trial court judge ignored F. M. Cocke's timely request for findings on what act or failure to act by him caused the delay.

F. M. Cocke's Parcel 2 as described in his deed was necessarily subjected to the Notice of Lis Pendens filed by the State of Arizona in its eminent domain action against him. Such action was filed in late 1965, and was not settled until early 1970, at which time the State gave up its attempt to take a 20-foot strip of land out of Parcel 2 without payment. The State attempted to establish that the south boundary of Parcel 2 was 27-1/2 feet north of the centerline of the Jenkins Ditch, a large drainage canal which borders the south boundary of Parcels 1 and 2 and provides drainage. In order to establish such south boundary at its true location, and so reduce the area the State was taking without payment, F. M. Cocke had the canal right of way surveyed and marked. The surveyor had previously surveyed Parcels 1 and 2, and designated the canal right of way as Parcels [6] 1A and 2A. Transamerica and the Buyers were advised of the dispute and were furnished copies of the surveys of all parcels by the surveyor in December, 1968. Some fifteen months later the State, after changing its land descriptions several times, finally amended to agree with the 1892 grant of right of way for the canal, with the

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subsequent prescriptive use of the canal orth of the grant, and with the survey, hich placed the boundary line at the north ater edge of the canal, some 20 feet arther south than originally claimed.

As more particularly hereinafter set orth, in significant time sequence, Buyers nd Transamerica joined in two attempts to btain F. M. Cocke's signature to warranty eeds which included Parcels 1A and 2A, in ddition to Parcels 1 and 2, although the ight of way of the Jenkins Ditch was specifically excluded from the land descriptions ade a part of the October 9, 1968, agreeent and instructions, and was not the subject of any additional contract. The Cockes, nd therefore the trustee Bank, had never cquired title to the canal right of way, lthough it was within their fence lines. ransamerica also attempted, as also discussed below, to establish that F. M. Cocke as in default because the surveyor had included as part of Parcel 2 a small triangle f land, about 65 square feet, not yet taken y the State at the time of his survey and escription of Parcel 2. This is the Brown ngineering Company's description, which was opied into F. M. Cocke's deed to Parcel 2. owever, the purpose of the Notice of Lis endens was to notify all interested parties that the State was lawfully taking from F. M. ocke's property rights, including his rights in Parcel 2, as much as was needed for public se but only as much as the public was willing to pay for. The attorney who represented the State in its eminent domain case, aricopa County No. 183278, against F. M. ocke, was a law partner of Transamerica's ttorney in C-222472. [7]

IV.

THE DEFENDANTS

1. THE PARTIES TO THE AGREEMENT, AND THEIR LAWYERS.

(1) THE ESCROW AGENT AND TITLE INSURER.

Transamerica Title Insurance Company of Arizona, an Arizona corporation, accepted the escrow instructions as the terms of deposit of Sellers' three deeds, and so assumed the duties to comply with such instructions as escrow agent and as title insurer. However, its assumption of duties as indicated on the face of its printed escrow form was subject, among other things, to paragraphs 24 and 43 of the fine print instructions on the back.

Cancellation paragraph 24 specifies that if the escrow agent, either because it is unable or unwilling, fails to comply with the escrow instructions, or escrow agreement (unless already cancelled under paragraphs 16-18 by failure of Seller or Buyer to comply), the escrow agreement is thereby ended. The escrow agent is directed to collect the charges and return any extra money to the depositors thereof, and the deeds are to be returned to the parties who executed same. The unwillingness of Transamerica to issue any title policy provided for puts an end to the agreement in the same manner as the failure of the escrow agent to comply with the instructions. Such end of the agreement is independent of compliance by Seller and Buyer, and requires no notice to or by any party.

Paragraph 43 provides, simply and effectively, that "Close of Escrow" shall mean

the date of the policy of title insurance to be issued. In other words, the escrow cannot close unless and until Transamerica guarantees the titles in the Buyer. As briefly stated in Higgins v. Kittleson (1965), 1 Ariz. App. 244, 401 P.2d 412:

> [8] The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).

Under these conditions, the unwillingness of Transamerica to issue a title policy insuring the grantee's title could stem from any failure of the escrow agent or of a buyer to comply with the escrow instructions which constitute, as here, the terms of deposit of a seller's deed, as well as from a defect in such deed or in the title to the land described therein.

In the proceedings leading to the separate judgments in C-222472 in favor of Transamerica, and in F. M. Cocke's appeals from such judgments, Transamerica has been represented by Powell B. Gillenwater as its attorney at law.

(2) THE BUYERS

James Stewart Company is an Arizona corporation engaged in the construction business and in the development of land. M. Seth Horne is president of the company. He and his wife, Maurine D. Horne, were named as nominees by the Company acting by its president. Wallace O. Tanner signed the agreement and escrow instructions for the Buyers as vice president of the Company. He also acted in the capacity of attorney at law in C-222472 for the Company and the Hornes until replaced in such representative capacity by Hubert E. Kelly and Steven H. Schneider.

On March 5, 1969, at Transamerica's office, the escrow officer handed to F. M. Cocke for his signature a stack of documents. He signed the 25 mortgage releases, but refused to sign the document on the bottom of the stack. This was the warranty deed which included Parcels 1A and 2A, in addition to Parcels 1 [9] and 2, referred to above beginning at page 6, line 10. Upon questioning, the escrow officer stated that such deed had been prepared and deposited into escrow by the Buyers, with the verbal instruction that F. M. Cocke's signature was to be obtained thereon. Since F. M. Cocke's deeds had been in the escrow file for more than two months, he signed and delivered into escrow, on a printed form furnished by the escrow agent, a 13-day notice of intent to cancel upon the continued failure of the Buyers to comply, and then left the office. As later alleged by Buyers in their pleadings, the escrow agent by telephone then reported the failure to obtain the signature to Wallace Tanner, who prepared a second spurious deed, without Parcels 1A and 2A, for F. M. Cocke's signature. A copy of this No. 2 spurious deed was attached to Buyers' complaint of April 22, 1969, as evidence that F. M. Cocke had

refused to execute the deed required to be executed by him. As evidence that he had also refused to execute the mortgage releases, Buyers attached 25 unsigned copies, apparently of the 25 originals that F. M. Cocke had signed on March 5, 1969. The trial court judge made no findings on the falseness of such claims or such evidence, despite F. M. Cocke's protests.

Copies of F. M. Cocke's notice of intent to cancel, and of the escrow agent's notice thereof to Buyers are attached as Exhibit C. The former specified that personal checks were not acceptable as payments under a cancellation notice.

On March 7, 1969, the escrow agent received Buyers' letter of new instructions and demands, enclosing two personal checks for $32,000 each, dated March 7, 1969, and Buyers' notes and mortgages totalling about $420,200. A copy of Buyers' letter, and of the escrow agent's notice that Buyers had so complied, are attached as Exhibit D. It has not been disputed that Buyers' new instructions directed the escrow agent to:

[10] ITEM 1. Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions.

ITEM 2. Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

ITEM 3. Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

ITEM 4. Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers.

ITEM 5. Accomplish Items 1 through 4 before turning over to Sellers the two personal checks for $32,000 each, as the annual payment due January 2, 1969.

As mentioned above at page 5, line 5, on March 10, 1969, the escrow agent notified Sellers by mail that by such instructions, documents and demands the Buyers had done everything required of them to close the escrow. In view of Buyers' demand that the $64,000 represented by the two personal checks was not to be paid unless and until the warranty deeds included deeds to Parcels 1A and 2A, the escrow agent's notice to Sellers, which amounted to notice that the additional deeds were required by the escrow instructions earlier agreed to, was its second fraudulent attempt to secure warranty deeds to Parcels 1A and 2A, the first having failed five days earlier. Had either of these attempts succeeded, the close of escrow would have been delayed pending successful conclusion of a quiet title suit by the person who signed such deed against the heirs of B. J. George, whose name does not appear in the chain of title, at least to Parcel 2, after 1903. This would have effected a saving to Buyers of about $85 per day in interest charges, and a windfall for the escrow agent in its free use of funds already on deposit, [11] under fine print paragraph 12.

On March 20, 1969, the escrow agent advised F. M. Cocke that his notice of intent to cancel was ineffective because he was himself in default because Transamerica was unwilling to issue its title policy on Parcel 2 as described in F. M. Cocke's

deed. Transamerica based its announced unwillingness on its unsupported and unsupportable claim that F. M. Cocke had been divested of his earlier title to a tiny triangle of land worth about $6.00, mentioned above at page 6, line 19, by a neighbor's 1965 corrective quit-claim deed to the State of Arizona, in connection with its acquisition of highway right of way on the other side, the south side, of the Jenkins Ditch. The State, although named grantee in the neighbor's deed, made no claim of title thereunder, as shown by the record in the eminent domain case.

One of the games being played with Buyers' March 7, 1969, written demand for the inclusion of Parcels 1A and 2A into the deeds, with the March 10 written acceptance and approval of such demand by the escrow agent, and with the March 20 statement by the escrow agent before a witness that Transamerica was unwilling to insure title to Parcel 2 as described in F. M. Cocke's deed, was to mislead and coerce him into signing a new deed. The March 19 deadline for compliance by Buyers, specified by the escrow agent's written cancellation notice to Buyers on March 6, 1969, had passed, and unless Buyers and the escrow agent could establish that F. M. Cocke was himself in default when he filed his notice of intent to cancel, the agreement had already come to an end. F. M. Cocke's signature to any sort of corrective deed would admit that the earlier deed was in fact defective, that his notice of intent to cancel was therefore ineffective, and that the agreement was not cancelled even though Buyers had not complied. (This would not affect its repudiation.)

However, this concerted attempt did not succeed, since [12] F. M. Cocke signed no

new deeds. The concerted attempt may explain why, when Buyers moved the controversy to the state courts, about a month later by filing their Complaint For Specific Performance of the agreement and escrow instructions, they named as defendants only the Sellers, and have never joined Transamerica either as escrow agent holding the deeds or as title insurer. The failure of such attempt may explain the otherwise unexplainable claims made by Buyers in their Complaint, mentioned above at page 9, line 13, that F. M. Cocke had refused to execute the required deed and mortgage releases, and Buyers' submission of the unsigned copies of the No. 2 spurious deed and the second set of releases, as exhibits. F. M. Cocke's signature on a set of corrective releases, particularly if he had signed the first set on November 5, 1968, before the survey, as alleged by Transamerica in a pleading verified by the escrow officer, would serve the same purpose as a corrective deed. The possibility of curing Buyers' cancellation of the agreement by this scheme may explain attempts made by Buyers, with the apparent aid of a judge, to persuade F. M. Cocke to settle the dispute by the seemingly harmless signing of the new deed or the new releases.

On April 2, 1969, Wallace Tanner filed for record a copy of the Agreement and escrow instructions of October 9, 1968, in the office of the Maricopa County Recorder. Subsequent tax bills add James Stewart Company as an owner.

(3) THE LIFE TENANT

Joan H. Cocke signed the agreement and escrow instructions as life tenant of the trust of which First National Bank of Arizona is managing trustee. Joan H. Cocke is and

has been for many years under constant treatment for alcoholism. She was represented in the making of the agreement and escrow instructions, and the agreement as to the trustee Bank's instructions, and in C-222472, solely by Loretta S. Whitney, as her attorney at law. [13]

On October 10, 1968, by letter prepared by attorney Whitney, F. M. Cocke and Joan H. Cocke jointly directed the trustee Bank, as authorized by the trust agreement, to deposit into escrow its deed to the half-interest in Parcel 1 held by it, along with specific escrow instructions: first, that the sale was to be consummated in accordance with the instructions already agreed to by all parties, which included the cancellation provisions, and second, that the proceeds of sale of the trust land were to be disposed of as further instructed by F. M. Cocke and Joan H. Cocke.

The trustee Bank deposited its escrow instructions as directed, but along with a deed to the whole of Parcel 1 instead of the half-interest held by it, which deed it refused to correct. It appears that because of this spurious deed attorney Whitney was subsequently able to obtain a judgment that the proceeds from the trust half-interest in Parcel 1 were to be paid to Joan H. Cocke, alone, free of trust. Being aware that F. M. Cocke was to be paid for his half-interest (none of his land has ever been in a trust), trial court judge Jack D. H. Hays on December 31, 1968, plausibly ruled that Joan H. Cocke was entitled to be paid for the other half, since according to the spurious deed both half-interests were held in trust.

However, unless it be established that the various state courts had jurisdiction in C-222472 to delete the cancellation

provisions from the escrow agreement, and to delete from the record Buyers' letter of new demands received by the escrow agent on March 7, 1969, along with the escrow agent's letter of March 10, 1969, notifying Sellers that by such new demands Buyers had complied with the escrow agreement, it also appears that the question of the disposition of the trust land proceeds is moot. There are to be no such proceeds because the agreement came to an end in March, 1969, by repudiation or cancellation in accordance [14] with paragraphs 18 or 24, and the trustee Bank's deed must therefore be returned to it, as specified by the cancellation provisions. Without more, this is established by the written agreement of November 27, 1972, mentioned above at page 5, line 9, between Hubert Kelly for Buyers, Loretta Whitney for Joan H. Cocke, and Transamerica, that Buyers had not yet complied with the October 9, 1968, agreement. Further, by letter to Transamerica dated August 29, 1973, Buyers demanded that Transamerica comply with the judgment of September 27, 1972, against F. M. Cocke, alone, obtained by Buyers in their suit for specific performance of the escrow agreement, in which Transamerica was never joined. In the letter Buyers reminded Transamerica that in a meeting in its office in early January, 1973, Buyers and Transamerica agreed between themselves that Buyers had not yet complied with the agreement and escrow instructions of October, 1968. Copies of the November 27, 1972, agreement, and of Buyers' letter of August 29, 1973, are attached as Exhibit E. As established by their letter of August 29, 1973, Buyers deposited additional funds in order to attempt to comply in January, 1973: with the October, 1968, escrow instructions; with F. M. Cocke's March 5, 1969, written 13-day notice of intent to cancel upon Buyers' continued failure to comply; with

the escrow agent's March 6, 1969, written notice to Buyers that they must comply by March 19, 1969; with the escrow agent's March 10, 1969, written notice to Sellers that Buyers had complied; and with Buyers' own letter of March 26, 1969, to Transamerica affirming that all requirements on the part of the Buyers had been fully performed.

(4) THE BROKER

Arleigh H. Burton signed the escrow instructions as the real estate Broker. He has taken no position in the controversy in the state courts except to testify by depsition. Fine print [15] paragraph 23, which provides benefits for a broker, was superseded by the sixth paragraph ofSchedule "A", a part of the escrow instructions. Arleigh R. Burton is named as a nominal defendant herein to afford him proper notice in the event he should choose to join in this suit.

2. THE JUDGES

(1) IRWIN S. CANTOR, acting as the judge of the Superior Court of Arizona, in and for the County of Maricopa, in Civil Case No. C-222472, has entered judgments and orders without jurisdiction in the court.

The litigation in the state courts began in April, 1969, when Buyers filed their Complaint For Specific Performance of the agreement and escrow instructions against only Sellers. F. M. Cocke along with his answer counterclaimed against Buyers, against Transamerica as an additional defendant on his counterclaim, and cross-claimed against Joan H. Cocke, all as joint as well as several defendants indispensable to an adjudication of the rights and

obligations arising under the single contract entered into. However, the judge on Transamerica's motion ordered F. M. Cocke's claims separated by amendment into three separate claims, against each instead of all of the other parties to the agreement, over F. M. Cocke's objections. The judge thereafter dealt with the separated claims as separate and independent controversies arising from separate and independent causes of action, and eventually entered separate and independent judgments against F. M. Cocke. Each of these three judgments, in order to grant the relief sought by one of such three other parties, decisively altered the escrow instructions. Copies of the three judgments are attached hereto as Exhibit F. F. M. Cocke did not amend as to Joan H. Cocke, her claim to the trust land proceeds appearing by that time to be moot. Buyers had already answered the original counterclaim, and were basing [16] their defense on the unsupportable claims that F. M. Cocke had refused to execute the deed and mortgage releases required to be executed by him, the same as in their complaint.

(2) EINO M. JACOBSON, acting as a judge of Department B, Division 1 of the Arizona Court of Appeals, has entered orders without jurisdiction in the court, in an appeal in C-222472.

F. M. Cocke appealed from the early separate summary judgment of November 10, 1970, in favor of Transamerica on its counterclaim for attorney fees by the enforcement of only fine print paragraphs 8, 9 and 10. Subsequent to the filing of the briefs, F. M. Cocke sought by special action the dismissal of Transamerica's suit against him, on the ground that the trial court, and therefore the appellate courts, were without jurisdiction in the absence of the

Buyers. F. M. Cocke also sought stay of the proceedings on his claims against Transamerica until his claims against Buyers, as indispensable parties, could be brought before that court.

However, Department B threatened sanctions for bringing a frivolous special action, and after a recess denied all relief. Wallace Tanner, attorney for Buyers, and several members of the staff of James Stewart Company were present at the hearing, although Buyers still maintain that there was no connection between them and Transamerica in C-222472. During the recess immediately following the threat, Wallace Tanner urged immediate settlement. With Eino Jacobson writing, the judgment awarding the attorney fees was affirmed. The issues of whether the agreement had been repudiated or cancelled, so putting an end to Transamerica's and Buyers' rights thereunder, before the attorney fees were incurred, were avoided by substitution of seven questions apparently framed by the writer for the questions actually presented for review by F. M. Cocke's opening brief. The documentary evidence, presented to the Court of Appeals by reference [17] in the brief to specific pages of the abstract of the record, was ignored, as in the trial court. The Court of Appeals' decision is reported as Cocke v. Transamerica (March, 1972) 16 Ariz. App. 556, 494 P.2d 756. In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S.Ct. 797 (1936), the court said at L.ed 1224:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right

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to introduce evidence and have judicial findings based upon it.

(3) FRANCIS J. DONOFRIO, acting as a dge of Department A, Division 1 of the izona Court of Appeals, has entered orders thout jurisdiction in the court, in an peal in C-222472.

Following entry in the trial court on ptember 27, 1972, of the separate judgnt in favor of Buyers, F. M. Cocke timely led a motion to vacate, for want of jurisction over the subject matter, that judgnt and the Transamerica judgment as ineased to $8,364.24 by the trial court dge after remand. The motion to vacate s denied November 6, 1972. The issues whether the agreement had been repudiated, cancelled by the failure of Buyers or the crow agent to comply or the unwillingness Transamerica to issue its title policy, d still not been ruled on by any court. e documentary evidence, including the reement and escrow instructions, and yers' letter of new demands in violent nflict therewith, was still ignored. On nuary 4, 1973, F. M. Cocke filed notice appeal from the two judgments and from e order of November 6, 1972, denying the tion to vacate same. Rule 73(b) as ended, 16 ARS Rules of Civil Procedure, lows sixty days to file notice of appeal, ich time commences to run from denial of motion to vacate, unless such motion does t qualify as a Rule 59(l) motion to alter amend.

Arizona adopted as its Rule 59(l) the esent Federal [18] Rule of Civil Produre 59(e). Moore's Federal Practice at lume 6A, page 59-250 (earlier edition p. 80), says:

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> Although the motion under (e) is to "alter or amend" the judgment, it would perhaps be more accurate to say that subdivision (e) deals with motions to alter, amend, or vacate. . . .The cases have wisely recognized the power of the court to vacate and set aside a judgment under 59(e).

Volume 3, Federal Practice and Proced-
e, Rules Edition, Barron and Holtzoff, in
08, page 387, discusses Federal Rule
e). Note 84.1 includes:

> A motion to set aside a judgment is one to alter a judgment under Rule 59(e). . . .Steward v. Atlantic Refining Co., C.A.3d, 1956, 235 F.2d 570.

The 1971 Pocket Part to Volume 3, for
during 1972, states under §1308 at page
:

> The First Circuit has held that resort should be made to the procedure of Rule 59(e), rather than Rule 60(b), if the time for moving under the former rule has not expired. Thus where a motion to vacate a judgment is made within 10 days of entry of judgment, and does not specify the rule under which it is made, it will be construed as a Rule 59(e) motion and will suspend the finality of the judgment for purposes of appeal.

First Circuit case was Foman v. Davis,
.1st, 1961, 292 F.2d 85, reversed on other
unds, 1962, 83 S. Ct. 227, 371 U.S. 178,
.ed 2d 222.

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At page 280 of the Pocket Part, note includes:

> Appellants' timely motion to vacate judgment of dismissal was equivalent of a motion to alter or amend judgment and terminated running of time for filing notice of appeal from date of judgment of dismissal to date of denial of motion to vacate; . . .Theodoropoulos v. Thompson-Starrett Co., C.A. 2d 1969, 418 F.2d 350, certiorari denied 90 S. Ct. 1697, 398 U.S. 905, 26 L.ed 2d 65.

Subsequent to the filing of F. M.
e's opening brief, Francis J. Donofrio,
ring to the trial court judge's separa-
of F. M. Cocke's counterclaims against
samerica from those against the Buyers,
red an order dismissing the appeal in
entirety as to the Buyers. The only
nd stated was [19] that the notice of
al was untimely. F. M. Cocke's motion
findings of the particular grounds upon
h the stated untimeliness was based was
ed by order entered by Francis J.
frio. Later, he entered the order dis-
ing the appeal as to Transamerica, on
motion, on the stated ground that the
al was frivolous, so once again avoid-
the issues of whether the agreement had
repudiated or cancelled, and ignoring
documentary evidence.

In Preston v. Denkins (1963) 94 Ariz.
382 P.2d 686, the Arizona Supreme Court,
ing en banc, in a unanimous decision
that a judgment void for lack of juris-
ion may be set aside by means of a motion
acate, and that an order setting aside
ntire judgment as void does not leave
judgment valid as against defendants

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t properly before the court on the motion
vacate.

3. THE CORPORATE OFFICER OF THE COURT

Title Insurance Company of Minnesota,
Minnesota corporation, did willingly
cept its appointment as an officer of the
urt under the trial court judge's Order
d Writ of Assistance, etc., of October
, 1973, on Buyers' Application in C-222472.
nnesota Title agreed to close the escrow
accordance with the escrow instructions
altered by the previous judgments and
ders, as further altered by such Order
d Writ, and as to be still further al-
red by the trial court judge in accordance
th such Order and Writ. Minnesota Title
s willingly accepted delivery to it by
ansamerica of the escrow file, including
e deeds, in the following circumstances:
e Order of October 31, 1973, took judicial
tice of, and so established, the fact that
ansamerica was unwilling as escrow agent
comply with the escrow instructions and
so unwilling to issue any title policy, so
quiring under paragraph 24 the return of
llers' deeds to the party who executed
me. It was established [20] on November 27,
72, and again in early January, 1973,
nce the Buyers did not even attempt to
mply until the latter date, that the
crow agent was unable or unwilling to
mply with the escrow instructions on
rch 10, 1969, when it formally notified
llers that Buyers had complied, as pointed
t beginning at page 14, line 3, above. In
e face of the established failure of the
yers to comply, the established inability
unwillingness of the escrow agent to
mply, and the established unwillingness
Transamerica to issue its title policy,
e trial court judge, the Buyers, Trans-
erica, and Minnesota Title, instead of

returning the deeds to the parties who executed them, joined in the delivery of such deeds to Minnesota Title, in furtherance of the concerted attempt to extort from F. M. Cocke his consent to the unlawful alterations to the agreement and escrow instructions.

Copies of Buyers' Application For Writ Of Assistance, etc., of the trial court judge's Order of October 31, 1973, granting the Writ, and of the Writ itself, are attached as Exhibit G.

V.

ADDITIONAL ALTERATIONS SOUGHT BY THE OTHER THREE PARTIES

Subsequent to the deposit of his deeds into escrow by the broker on or about December 31, 1968, F. M. Cocke advised Mr. Tanner, who signed the agreement for James Stewart Company, that he was in need of funds, and could wait no longer for the Buyers to complete their metes and bounds descriptions of the 5-acre mortgage release parcels. Mr. Tanner suggested, and F. M. Cocke agreed, that $20,000 would be advanced to F. M. Cocke from escrow funds upon his furnishing a note and mortgage on Parcel 2 for $40,000, as double security therefor, and allowing more time for Buyers to complete their release descriptions. On or about January 10, 1969, F. M. Cocke executed and deposited [21] on the escrow officer's desk the $40,000 note and mortgage, and received in exchange the escrow agent's check for $20,000 drawn on escrow funds. However, Mr. Tanner picked up the note and mortgage from the desk and carried them from the escrow office, over F. M. Cocke's objections but with the tacit approval of the escrow officer, in violation of fine print

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ragraphs 11 and 12 of the escrow agree-
nt. By his objections F. M. Cocke made
clear that it was his intention to de-
ver the note and mortgage into escrow.
defined in ARS §44-2208(14) delivery
ans voluntary transfer of possession.
en if Transamerica could establish, as
aimed by it, that by James Stewart Com-
ny's removal of the note and mortgage it
rely took back its $20,000 earnest money
yment delivered to Sellers by the escrow
ent, it is clear that the escrow could
t close until either the note with mort-
ge, or the extra $20,000 represented by
me, was delivered into escrow.

2. On January 21, 1969, F. M. Cocke
gned and delivered into escrow the In-
ructions And Agreement On Distribution
Funds prepared by the broker, a pro-
ssor of accounting, in accordance with
e trustee Bank's instructions specifying
int control of the trust land proceeds
F. M. Cocke and Joan H. Cocke. By letter
February 26, 1969, to the escrow agent,
epared by her attorney, Joan H. Cocke re-
diated the trustee Bank's adoption of the
ncellation provisions and its instruc-
ons as to the joint control, and demanded
yment of such proceeds direct to her.
yers by their documents and new demands
livered into escrow my mail on March 7,
69, the escrow agent by its March 10,
69, letter notifying Sellers that by such
cuments and demands Buyers had complied,
d the trial court judge in the judgment
tered September 27, 1972, in favor of
yers, joined in such repudiation.

3. March 19, 1969, was the last day for
yers to [22] comply under the mandatory
ncellation notice received from the
crow agent, following F. M. Cocke's
rch 5, 1969, notice of intent to cancel.

4. As discussed above at page 11, line 2, to page 12, line 20, on March 20, 1969, he escrow agent announced Transamerica's nwillingness to issue its title policy on . M. Cocke's Parcel 2. Under paragraph 4 such unwillingness put an end to the greement, if not already cancelled by the scrow agent's March 10, 1969, notice that uyers had complied or by the failure of uyers to comply by March 19, 1969.

5. As mentioned above at page 14, line 26, on March 26, 1969, in a second letter to he escrow agent, Buyers affirmed their osition that the documents and demands deivered into escrow on March 7 met all reuirements on the part of the Buyers. uyers' continued insistence that their ew demands be met as a condition to close f escrow constituted, without more, repuiation of the agreement. In Equitable rust Co. of New York v. Denver and R. G. ailroad Co. v. Western Pac. Railroad Co. (1917) 244 F. 485, affirmed CCA, 2d (1918) 250 F. 327, cert. den. (1918) 246 U.S. 672, 2 L.ed 932, 38 S. Ct. 423, Learned Hand, istrict Judge, said at 244 F. 501:

> To say that you will not pay as bound, unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. That is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.

VI.

THE ENLISTMENT OF STATE POWER

1. On April 22, 1969, Buyers filed their Complaint For Specific Performance of the agreement and escrow instructions, and for damages for delay, against only Sellers. A copy of the agreement and instructions was attached to the complaint. The [23] case was assigned to trial court judge Irvin Cantor as Case No. C-222472. Although Buyers demanded as part of the relief sought that the title insurance policies be issued, that the escrow be ordered closed, and that Transamerica be ordered to release the mortgages on the 25 release parcels as provided in the agreement, Buyers have never joined Transamerica, as mentioned above at page 12, line 1. The suit was prosecuted against only F. M. Cocke.

2. On June 23, 1969, F. M. Cocke filed his answer and compulsory counterclaim and cross-claim jointly and severally against Buyers, Transamerica, and Joan H. Cocke, as indispensable parties to the adjudication of the mutual rights and obligations arising from the single contract. F. M. Cocke's counterclaim sought return of Sellers deeds, and damages for delay, based on his claims:

(1) that the rights and obligations of Sellers and Buyers were subjected to the rights and obligations delegated by them to Transamerica as esscrow agent and title insurer, particularly by fine print Cancellation paragraph 24;

(2) that without more the agreement had been repudiated, and so terminated or cancelled, by Buyers' new demands received by the escrow agent March 7, 1969,

so requiring return of the deeds;

(3) that the agreement had been cancelled as specified by paragraph 24 by the escrow agent's formal written notice of March 10, 1969, to Sellers that by the documents and new demands received from Buyers they had done everything required of them to close the escrow, so establishing the escrow agent's inability or unwillingness to comply with the instructions earlier agreed to, and requiring the return of the deeds;

(4) that the agreement had become cancelled as specified by paragraph 18 by Buyers' failure to comply within the [24] 13-day period following the filing on March 5, 1969, of F. M. Cocke's notice of intention to cancel, as provided for by paragraphs 16 and 17, so requiring return of the deeds; and

(5) that the agreement had been cancelled as specified by paragraph 24 by Transamerica's unwillingness to issue its title policy on Parcel 2, as announced on March 20, 1969, by the escrow officer, so requiring return of the deeds.

3. By minute entry of September 2, 1969, the trial court judge ordered that F. M. Cocke's counterclaim and cross-claim be amended so as to separate the joint claims into three separate claims, one against each of the three defendants as discussed above at page 15, line 19, with separate and independent judgments. F. M. Cocke did not amend his cross-claim against Joan H. Cocke, for the reasons stated above at page 15, line 30.

4. On October 3, 1969, Transamerica counterclaimed against F. M. Cocke, seeking

attorney fees by the enforcement of fine print paragraphs 8, 9 and 10 without regard to the issues raised by F. M. Cocke as to whether the agreement had been repudiated or cancelled before the attorney fees were incurred.

5. On November 10, 1970, the trial court judge entered separate summary judgment in favor of Transamerica and against F. M. Cocke on their opposing counterclaims, and awarded costs and attorney fees to Transamerica in the amount of $5,192.24. Neither in nor in connection with the judgment where there any findings upon the issues raised by F. M. Cocke or upon the undisputed documentary evidence presented in support of his claims, contrary to Rule 56(d).

6. On November 19, 1970, the trial court judge entered judgment in favor of Joan H. Cocke on F. M. Cocke's cross-claim against her, without regard to the cancellation provisions, which were adopted by the trustee Bank. The deposit of the trustee Bank's deed into escrow in the written terms which accompanied [25] such deposit, and the acceptance thereof by the escrow agent, constituted a contract in and of itself between the trustee Bank and the escrow agent. Such contract could not be altered by a court without the consent of both, and the terms of deposit required under paragraphs 18 and 24 the return of such deed upon the established failure of the escrow agent and of Buyers to comply in March, 1969.

7. By minute order of December 8, 1970, the trial court judge granted Buyers' motion for summary judgment against only F. M. Cocke, on their opposing claims. Trial on the issue of the dollar amount of the

damages for delay claimed by Buyers to have been caused by F. M. Cocke was subsequently set.

8. Prior to the trial without a jury F. M. Cocke under Rule 52(a) requested findings of fact and conclusions of law as to when and by what act or failure to act he had failed to comply with the agreement and instructions so as to cause the claimed delay. He also requested findings and conclusions as to when and by what act Buyers had complied so that the escrow could have been properly closed instead of cancelled. These requests were completely ignored. The beginning of the period of claimed delay was thus never established.

9. On September 27, 1972, following the trial, the trial court judge entered judgment in favor of Buyers, granting them specific performance by F. M. Cocke, alone, of the agreement and instructions as altered by the judgment, and awarding them damages against him for claimed delay in the amount of $47,004.86. As with the judgment in favor of Transamerica, there were no findings upon the issues raised by F. M. Cocke or upon the undisputed documentary evidence presented in support of his claims.

10. Following the piecemeal dismissal of F. M. Cocke's appeal from the judgments and from denial of his motion to vacate same, as set forth above beginning at page 18, line 28, the Court [26] of Appeals by order dated October 30, 1973 directed the return of the record to Superior Court.

11. As mentioned above at page 19, line 17, on Buyers' Application in C-222472 the trial court judge on October 31, 1973, issued the Order and Writ of Assistance to carry the unlawful alterations into effect

by ordering that the escrow be closed in accordance therewith. Among other things, the Order, prepared by Buyers' attorney, authorized Minnesota Title to execute all documents, including warranty deeds, in the name of Francis M. Cocke. This would include the No. 2 spurious deed and the second set of mortgage releases, mentioned above at page 12, line 7. Among other things the Writ, also prepared by Buyers' attorney, directed the Sheriff of Maricopa County to remove F. M. Cocke from possession of the land upon compliance by Buyer with the terms as altered by the Order and Writ and as to be further altered by further court order.

VII.

WANT OF JURISDICTION OVER THE SUBJECT MATTER

Each of the separate judgments in C-222472 in favor of the three other parties to the agreement, Joan H. Cocke, Transamerica, and the Buyers, was and is void on its face for lack of jurisdiction over the subject matter, as was and is also each of the orders of the appellate courts which directly or indirectly upheld such judgments.

In Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, cert. den. (1972) 406 U.S. 945, 32 L.Ed.2d 332, the court said at 156:

> The Supreme Court long ago established the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter:
>
> Jurisdiction is defined to be the power to hear and determine the

> subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to enforce such judgment or decree. (Citations omitted.) [27]
>
> Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution. (Emphasis added.) Riggs v. Johnson County, 1867, 73 (6 Wall.) U.S. 166, 187, 18 L.Ed 768.

In the words of Rule 12(b), if a court is without the power or jurisdiction to grant the relief sought, it is without jurisdiction over the subject matter. Rule 12(b) 6 & 1, as amended, Federal Rules of Civil Procedure, and 16 ARS Rules of Civil Procedure.

1. ALTERATION OF CONTRACTS

As briefly stated in Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318, another universal rule is:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Where the intent of the parties is expressed

> in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.
>
> (Citations omitted)

It follows that where the relief sought is the alteration of a valid provision of a valid contract, the court is without jurisdiction over the subject matter.

2. INDISPENSABLE PARTIES

In Provident Tradesmen's Bank & Trust Co. v. Patterson (Jan., 1968) 390 U.S. 102, 19 L.Ed 2d 936, 88 S. Ct. 733, in reviewing Rule 19 as amended and the cases relied on by the Court of Appeals in dismissing a complaint in the absence of an indispensable party, the court at page 951 of 19 L.ed 2d quoted and approved Mallow v. Hinde, 12 Wheat. 193, 6 L.ed 599. In Mallow v. Hinde, the court upheld dismissal of the complaint, even though the absent party could not be joined because not within the territorial jurisdiction of the lower court. The court in that early case said: [28]

> In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the Court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties. . . .We do not put this case upon the ground of jurisdiction, but upon a much broader ground. . . .We put it on the ground that

> no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.

Put another way, in order to grant by judgment or decree the relief sought the court must have power or jurisdiction over all persons whose rights are to be affected thereby; otherwise, execution could not issue to carry the judgment or decree into effect. Terrell v. Allison, 21 Wall. 289, 22 L.ed 634, was one of the cases stating the rule pointed to in Hamilton v. Nakai, supra, that the jurisdiction of a court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties. In Terrell the court also stated and followed the rule that a writ of assistance can only issue against parties whose rights have been determined in the proceedings, and persons entering into possession under them after suit commenced, pendente lite, and are thus bound by the decree.

In the words of Rule 12(b)1, 6 & 7, the court is left without jurisdiction over the subject matter where left without the power or jurisdiction to grant the relief sought because of failure to join a party indispensable under Rule 19.

3. WANT OF FINDINGS

In none of the proceedings, orders, or judgments in the state trial court in C-222472 was there any specification, decision, finding of fact or conclusion of law, under Rule 56(d) on summary judgments or under Rule 52(a) on trials to the court, on the issues of fact and law raised by

F. M. Cocke in his affirmative claims against Joan H. Cocke, Buyers and Transamerica, [29] or on the undisputed documentary evidence presented in support of such claims.

In Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U.S. 603, 19 S. Ct. 761, 43 L.ed 1103, the court said (L.ed, p. 1105):

> As was said in Thompson v. Hatch, 3 Pick. 512: "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. . . .The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

In United States v. Aluminum Co. of America, 2 F.R.D. 224 (1941), the District Court S.D. New York said at page 231:

> Rule 52 is incontrovertibly valid. It is also mandatory; it is as binding on this court as would be a statute in the same terms. Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U.S. 603, 608, 609, 19 S. Ct. 761, 43 L.ed 1103; Weil v. Neary, 278 U.S. 160, 165, 169, 170, 49 S. Ct. 144, 73 L.ed 243. See In re G. W. Giannini,

> Inc., 2 Cir., 90 F.2d 445, 447, 111 A.L.R. 1492.
>
> So far I have refrained entirely from going into numerous issues made by the pleadings and have not even mentioned the evidence bearing on them.
>
> For the reasons given, therefore, it seems to me (1) that this court is without authority to dispense with either the findings or the conclusions contemplated by Rule 52 and (2) that, in order to obey the rule, as construed by the Supreme Court--regardless of the contents of the oral opinion--findings must be made and conclusions stated on all issues in the present case.

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S. Ct. 797 (1936), supra, the court said at L.ed. 1224:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

It follows that the separate judgments entered in C-222472 in [30] favor of Joan H. Cocke, Transamerica, and the Buyers were wanting in findings and therefore wanting in due process of law, and the court was therefore without authority or jurisdiction to grant the relief sought and purportedly

ranted, and thus without jurisdiction over he subject matter.

In Thompson v. Whitman, 85 U.S. 457, 1 L.ed 897, the court said at L.ed 901:

> Thus, in Elliott v. Peirsol, 1 Pet., 328, 340, it was held that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, it it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.

In Arenas v. United States, 95 F. Supp. 62, affirmed (9th Cir. 1952) 197 F.2d 418, he district court said, at page 970 of . Supp.:

> In brief, the Court, in the prior Arenas case, had no jurisdiction of the subject matter which it assumed to determine, the relationship of Arenas and others not before the Court to Guadaloupe's allotment as her heirs at law. Such lack of jurisdiction appears

> on the face of the judgment roll. The judgment to that extent is, therefore, void on its face, . . .
>
> (emphasis added)

In Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965), 341 F.2d 514, the court said at 516:

> . . .if jurisdiction is lacking the trial court should on its own motion decline to proceed and if the case is tried where jurisdiction is lacking, the jurisdiction of the appellate court on review is limited to correcting the error of the trial court in entertaining the action. These principles are fundamental and were recognized and applied by us in the recent case of Rock Island Millwork Co. v. Hedges-Gough Lumber Co. (8th Cir., 1964), 337 F.2d 24, 26, 27.
>
> (emphasis added) [31]

For related rulings see Riley v. County of Cochise (Div. 2), 10 Ariz. App. 55, 455 P.2d 1005 (1969), and Quiroz v. Alfaro (Div. 2), 18 Ariz. App. 173, 500 P.2d 1161 (1972), Reh. den. Oct., 1972.

VIII.

WANT OF JURISDICTION IN C-222472

1. ALTERATION OF CONTRACTS

Each of the three separate judgments in C-222472 against F. M. Cocke was and is void on the face of the judgment roll for want of power or jurisdiction to grant the

relief sought and purportedly granted, which relief was alteration of the escrow instructions:

(1) by the judgment in favor of Joan H. Cocke, the deletion of the trustee Bank's instructions, which included the cancellation provisions;

(2) by the judgment in favor of Transamerica, the deletion of at least the cancellation provisions, by the enforcement of only paragraphs 8, 9 and 10;

(3) by the judgment in favor of Buyers, the deletion of the conditions specified in the first sentence of fine print paragraph 14 as to compliance by Buyers and as to the willingness of Transamerica to issue its title insurance policy, and the deletion of the cancellation provisions.

2. INDISPENSABLE PARTIES

Each of such judgments was and is void on the face of the judgment roll for want of power or jurisdiction to grant the relief sought and purportedly granted, because of failure to join a party indispensable under Rule 19:

(1) by the judgment in favor of Joan H. Cocke, by the failure to join the trustee Bank and the escrow agent in the alteration of the terms of deposit of the trustee Bank's deed, agreed to by them. [32]

(2) by the judgment in favor of Transamerica, by the failure to join the Buyers, indispensable in the determination of whether the agreement was ended, so ending the rights thereunder of Transamerica and of Buyers, before the attorney fees were incurred;

(3) by the judgment in favor of Buyers, by the failure to join Transamerica as title insurer and holder of the deeds.

3. WANT OF FINDINGS

Each of such judgments was and is void on the face of the judgment roll for want of power or jurisdiction to grant the relief sought and purportedly granted, because such judgment was wanting in findings upon decisive issues presented and upon undisputed documentary evidence presented which was decisive of such issues, and therefore wanting in due process of law. In none of such judgments, nor in the trial court judge's orders based thereon, was there any finding as to the effect of the following:

(1) the cancellation provisions;

(2) the trustee Bank's written escrow instructions adopting the cancellation provisions;

(3) F. M. Cocke's March 5, 1969, written notice of intent to cancel, and the escrow agent's written notice thereof to Buyers, notifying Buyers that they must comply by March 19, 1969;

(4) Buyers' documents and written demands received by the escrow agent on March 7, 1969;

(5) the escrow agent's letter of March 10, 1969, formally notifying Sellers that by deposit of such documents and demands Buyers had complied;

(6) the written agreement of November 27, 1972, between Transamerica and counsel for Joan H. Cocke and for Buyers, that Buyers had not yet complied; [33]

(7) the further agreement in January, 1973, between Transamerica and the Buyers, evidenced by Buyers' letter of August 29, 1973, attached as Exhibit "K" to Buyers' September 7, 1973, Application to the trial court for the Writ of Assistance, that by January, 1973, Buyers had not yet complied.

IX.

SETTLED PRINCIPLES

It is well settled that expressions by a party to an escrow agreement, particularly where there has been no change in title or possession under its terms, as here, of mere willingness and ability to comply are immaterial to the question of actual compliance. 28 Am Jur 2d, Escrow, §21, 22, 24; 30A CJS, Escrows, §10(a) and 10(b).

As pointed out in Tucson Title Insurance Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963):

> An escrow agent is held to strict compliance with the terms of the escrow agreement, and is liable for all damages resulting from any deviation.

It has long been settled that where the conditions are fulfilled and the escrow agent fails or refuses to deliver or return the documents or money deposited into escrow, the remedy either in law or equity lies against the escrow agent to obtain the deposit, not against the other party to obtain damages or to compel specific performance of the escrow contract. The other party may be joined in the action against the escrow agent. 28 Am Jur 2d, Escrow, §8, 17, 39; 30A CJS, Escrows, §15.

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In Old Wayne Mutual Life Assn. v. onough, 204 U.S. 8, 51 L.ed 345, 27 S.Ct. , the court said, quoting Scott v. McNeal, U.S. 34, 46, 38 L.ed 896, 901, 14 S. Ct. 8:

> No judgment of a court is due process of law, if rendered without the jurisdiction in the court, ... [34]

The Arizona case Truax v. Corrigan, U.S. 312, 66 L.ed 254, 42 S. Ct. 124, ted and followed Barbier v. Connelly, U.S. 27, 28 L.ed 923, 5 S. Ct. 357, which the court said at L.ed 264:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, . . .that all persons. . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; . . .

In Shelly v. Kraemer, 334 U.S. 1, 92 d 1161, 68 S. Ct. 836, the court held t the action of state courts and of icial officers in their official capaci- s, even though taken for the enforcement private agreements, is state action with- the meaning of the equal protection use, and that where the coercive power state govenment is used by its courts to y rights subject to the protection of 14th Amendment, the action of the state rts cannot stand.

In Wells Fargo & Company v. Oscar G. Taylor, 254 U.S. 175, 65 L.ed 205, 41 S. Ct. 93, the court said, in discussing the provision in the Judicial Code that a federal court shall not grant an injunction staying proceedings in a state court, except in bankruptcy cases, at L.ed 211:

> . . .it has come to be settled by repeated decisions and in actual practice that, where the elements of Federal and equity jurisdiction are present, the provision does not prevent the Federal courts. . . . from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience.

In Northern Pacific Ry. Co. v. Kurtzman, County Treasurer, 82 F. 241, the court said:

> I recognize the absolute correctness of the proposition that the Federal courts are forbidden by express provisions in the law enacted by congress [35] to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the Federal court is a direct attack upon a judgment rendered in a state court for the purpose of nullifing such judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers,

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> the circuit courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. Galpin v. Page, 18 Wall. 351-375; Pennoyer v. Neff. 95 U.S. 714-748; Arrowsmith v. Gleason, 129 U.S. 86-101, 9 Sup. Ct. 237; Marshall v. Holmes, 141 U.S. 589-601, 12 Sup. Ct. 62. The bill of complaint attacks the judgment of the superior court on the ground that it acted without jurisdiction in rendering the judgments.

In Mitchum v. Foster, 407 U.S. 225, 32
d.2d 705, 92 S. Ct. 2151 (1972), the
rt held that:

> Provision of Civil Rights Act authorizing a suit in equity to redress deprivation under color of state law of any rights, privileges, or immunities secured by Constitution is within "expressly authorized" exception of federal anti-injunction statute prohibiting a federal court from enjoining a state court proceeding except as expressly authorized by act of Congress. 28 U.S.C.A. §2283; 42 U.S.C.A. §1983.

page 2161 of S. Ct. the court said:

> It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, whether that action be executive, legislative, or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25

> L.Ed 676 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

And at page 2162:

> §1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25 L.ed. 676. In carrying out that [36] purpose, Congress plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress.

In Lucarell v. McNair (6th Cir., Jan. 1972), 453 F.2d 836, the court said:

> Turning to the question of McNair's asserted immunity, it is true that as Referee and Administrative Officer of the Juvenile Court of Trumbull County, McNair was

> entitled to the full reach of the doctrine of judicial or, in this case, quasi-judicial immunity, and that the doctrine is applicable to actions instituted pursuant to §1983. Nevertheless, the doctrine is not without bounds. Some time ago the Sixth Circuit stated its views as to the limits of the protection thus afforded. In Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932), we indicated the view that a judge loses all immunity when he acts in absence of all jurisdiction. This rule was discussed at some length in the more recent case of Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970). See also Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646 (1871).

In Hoffman v. Halden (9th Cir. 1959), 268 F.2d 280, the court said at 296:

> In a Civil Rights conspiracy case, the injury and damage must flow from the overt acts. . . .In the usual case, the order of the court would be the proximate cause and the various preliminary steps would be remote causes of any injury. . . .

and at page 298:

> The law is clear that when two or more persons conspire to violate the civil rights of an individual, acting under color of state law, if one or more of the conspirators is a state officer, then the mere fact that certain of the other conspirators are not state officers

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> constitutes no defense to any of them under the Civil Rights statutes.

fman at page 299 in discussing the immun-
of judges cites Bradley v. Fisher, and
s on to say:

> A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute a judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts. [37]

In Bradley v. Fisher, 13 Wall. (U.S.)
, 20 L.ed 646, the court said, at pages
, 352 of 13 Wallace:

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

Cohen v. Norris (9th Cir. 1962) 300
d 24, the court said at page 29:

> In our view Monroe v. Pape announces the rule that an allegation of a purpose to discriminate

or a purpose to deprive one of any federal right, is not essential to the statement of a claim under §1983 predicated on an alleged violation of the due process clause of the Fourteenth Amendment. It is accordingly necessary for us to overrule in this respect the contrary holdings in our earlier decisions in Agnew v. City of Compton and Hoffman v. Halden, and to disapprove the contrary statement made by way of dictum in Walker v. Bank of America.

§44-1211 (14 ARS, 1967) provides:

A person is guilty of a misdemeanor who:

1. Is a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels or any right or interest issuing therefrom, had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands.

2. Is a party to any bond, action or judgment, or execution, contract or conveyance had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands.

3. Is a party as provided in paragraph 1 or paragraph 2 of this section, and

(a) At any time wittingly and willingly puts in, uses, avows, maintains, justifies or defends such transaction as true, and had or made in good faith, or

(b) Upon good consideration aliens, assigns or sells any of such lands or goods or other things which have been so conveyed to him. [38]

PRAYER FOR RELIEF

Plaintiff respectfully prays this Court to enter an order:

1. Granting a temporary restraining order or preliminary injunction on application of plaintiff if necessary to preserve the status quo as to title or possession;

2. Setting aside each of the three separate judgments, in favor of Joan H. Cocke, in favor of Transamerica, and in favor of Buyers James Stewart Company and M. Seth Horne and Maurine D. Horne, for want of jurisdiction in the court;

3. Granting plaintiff a declaratory judgment pursuant to the provisions of 28 U.S.C. 2201 declaring his rights and defendants' corresponding duties and liabilities arising under the transaction set forth in the complaint herein;

4. Ordering the return of Sellers' three deeds to the parties who executed same;

5. Ordering the return of the $40,000 note and mortgage to plaintiff on such terms as be deemed just and equitable;

6. By way of quieting title, establishingt plaintiff's estate in Parcel 2 as described in his deed thereto, and the estate of plaintiff and his co-tenant First National Bank of Arizona, as trustee, in their undivided half-interests in Parcel 1, as described in plaintiff's deed to his half-interest in same, and barring and forever estopping defendants James Stewart Company, M. Seth Horne and Maurine D. Horne from having or claiming any right or title to the premises, claimed by them as set forth in this [39] Complaint, adverse to plaintiff or the trustee Bank, all as provided by ARS §12-1101, 12-1102 as amended, 12-1103 as amended, and 12-1104;

7. Granting plaintiff damages severally and jointly from defendants Cantor, Jacobson, Donofrio, Tanner, Kelly, Schneider, Whitney, Gillenwater, Transamerica, Minnesota Title, James Stewart Company and M. Seth Horne and Maurine D. Horne, and Joan H. Cocke, pursuant to 28 U.S.C. §1343, 42 U.S.C. §1981, 1982, 1983, 1985, 1986 and 1988 and calculated as follows:

   a. $50,000 lost by plaintiff by delay in making higher and better use of his land, by reason of defendants' misconduct in C-222472;

b. $50,000 in damages for infringement of his civil rights by defendants' misconduct in C-222472;

c. $50,000 in punitive, exemplary damages by reason of defendants' misconduct in C-222472.

d. Such other and further relief as the Court deems just and equitable.

/s/ FRANCIS M. COCKE
1320 South Priest Road
Tempe, Arizona 85281

STATE OF ARIZONA)
: ss.
County of Maricopa)

F. M. COCKE being first duly sworn, on oath deposes and says:

That as plaintiff he has written the foregoing complaint and knows the contents thereof, and that the matters and things [40] stated therein are true of his own knowledge, except as to those matters therein specifically stated to be upon information and belief, and as to those matters he believes them to be true.

/s/ FRANCIS M. COCKE

[41] FRANCIS M. COCKE, Plaintiff
1320 South Priest Road
Tempe, Arizona 85281
(602) 967-0734

In propria persona

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FRANCIS M. COCKE,)
)
Plaintiff,)
)
vs.)
)
IRWIN S. CANTOR, et al.,)
)
Defendants.)
)

COMPLAINT FOR RELIEF FROM STATE COURT JUDGMENTS AND ORDERS ENTERED WITHOUT JURISDICTION, AND FOR INJUNCTION AND DAMAGES

EXHIBITS

[42] EXHIBITS

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A	Agreement and trustee Bank's instructions	2
B	F. M. Cocke's deeds to Parcel 2 and his half-interest in Parcel 1	2
C	F. M. Cocke's notice of intent to cancel, and the escrow agent's notice thereof to Buyers	9
D	Buyers' letter of new instructions and demands, and the escrow agent's notice that Buyers had done everything required to close the escrow	9
E	The November 27, 1972, agreement between Hubert Kelly for Buyers, Loretta Whitney for Joan H. Cocke, and Transamerica, and Buyers' letter of August 29, 1973, to Transamerica	14
F	The three separate judgments, of November 10, 1970, in favor of Transamerica, of November 19, 1970, in favor of Joan H. Cocke, and of September 27, 1972, in favor of Buyers	15
G	Buyers' Application For Writ Of Assistance, etc., the trial court judge's Order of October 31, 1973, granting the Writ, and the Writ itself	20

[43] AGREEMENT

THIS AGREEMENT made and entered into this 9th day of October, 1968, between JAMES STEWART COMPANY, Buyer, and JOAN H. COCKE and FRANCIS M. COCKE, Sellers, and together with that certain Escrow Agreement No. 02013111-7 entered into with Transamerica Title Insurance Company, signed by the same parties, a copy of which is attached hereto and by reference made a part hereof, constitutes the full agreement between the parties for the purchase and sale of approximately 124 acres of land, being that part of the SE 1/4 of Section 20, Township 1 North, Range 4 East, G&SRB&M, lying north of the right-of-way of the Jenkins Ditch, EXCEPT a parcel of 3-5 acres containing certain improvements of the Seller Francis M. Cocke situated at the northeast corner of the property, north of the George Ditch.

1. Sellers agree to cooperate with Buyer in altering the boundaries of any of the various 5-acre releases to fit the needs of the Buyer, and Buyer agrees that releases shall not impair access to unreleased portions of the land.

2. Seller agrees within two years to remove the farm sheds, barns, and unhoused farm implements, except for stables for three horses, from the 3-5 acres of land reserved from the sale.

3. On the parcel reserved from the sale, Seller agrees to grant easements before close of escrow for street and utility purposes, and to improve said easement by construction and paving at his cost, when streets are constructed and paved on the northeastern portion of the property for a half street on 13th Street

and a half street along the north side of the George Ditch.

4. In the event of any sale outside of Sellers' family, Sellers agree that Buyer shall have the right of first refusal (unless taken by the State of Arizona) to purchase the 11.2 acre triangle and the 12.9 acre "frog" in the south 100 acres of the SW 1/4 of Section 20, Township 1 North, Range 4 East, being Sellers' lands remaining after a portion of said 100 acres was taken by said State, and also to purchase the 3-5 acre parcel at the Northeast corner of property, reserved to Seller.

5. Buyer shall have the right to grant easements for road and utility purposes on the unreleased land. Easements for such streets [44] shall not however reduce the area of land on which release prices are computed.

6. This Agreement shall enure to the benefit of the parties hereto, their heirs, administrators, executors, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement the date and day first above written.

JAMES STEWART COMPANY
By
/s/ Wallace O. Tanner
BUYER Vice Pres.

s/Francis M. Cocke
FRANCIS M. COCKE

s/ Joan H. Cocke
JOAN H. COCKE
SELLERS

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the 9th day of October, 1968, before me, the undersigned officer, personally appeared FRANCIS M. COCKE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

s/ Mrs. Cecelia J. Burton
Notary Public

My commission expires:
Dec. 1, 1969

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the 9th day of October, 1968, before me, the undersigned officer, personally appeared JOAN H. COCKE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

s/ Mrs. Cecelia J. Burton
Notary Public

My commission expires:
Dec. 1, 1969

(RetypedFine Print Escrow Instructions)
[46]
SELLER:

1. Will deliver to Escrow Agent a ieed of the property from Seller to Buyer co be held by Escrow Agent until the terms nereof have been performed, at which time it shall deliver said deed to Buyer.

SELLER AND BUYER:

2. Will deliver to Escrow Agent all locuments, pay to Escrow Agent all sums and lo or cause to be done all other things iecessary, in the sole judgment of Escrow gent, to enable it to comply herewith and co enable Transamerica Title Insurance Company to issue any title insurance policy provided for herein.

3. Should these instructions contem- plate a transfer of an interest in an agree- nent for sale, Seller and Buyer will deliver co Escrow Agent such documents as Escrow gent may, in its sole judgment, require for the benefit of any party to said igreement.

4. Authorize Escrow Agent to pay, from any funds held by it for their respec- cive credit hereunder, all amounts necessary co procure the delivery of such documents ind to pay, on their behalf, all charges ind obligations payable by them respec- cively, as specified herein.

5. Will each pay to Escrow Agent, ipon demand, all charges payable by them respectively, as provided herein.

6. Authorize Escrow Agent to execute on their behalf, form assignments or other-

wise order changes in any insurance called for herein other than title insurance and forward the policies to insurer's agent with the request that the insurer consent to such transfer, attach loss payable clause or make such other additions or corrections as may be specifically required herein, and that said agent thereafter return such policies to Escrow Agent or to the parties entitled thereto.

7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

8. Authorize Escrow Agent, in the event any demand is made upon it concerning these instructions or the escrow, at its election, to hold any money and documents deposited hereunder until an action shall be brought in a court of competent jurisdiction to determine the rights of Seller and Buyer or to interplead said parties by an action brought in any such court. Deposit by Escrow Agent of said documents and funds, after deducting therefrom its charges and its expenses and attorney's fees incurred in connection with any such court action, shall relieve Escrow Agent of all further liability and responsibility.

9. Will indemnify and save harmless Escrow Agent against all costs, damages, attorney's fees, expenses and liabilities, which it may incur or sustain in connection with these instructions or the escrow or any court action arising therefrom and will pay the same upon demand.

[47] 10. Grant to Escrow Agent a lien upon and authority to reimburse itself: (1) for its charges and for any damages or expenses which it may incur or sustain in connection herewith from all of the right, title and interest of either the Seller or the Buyer in all of the documents and money deposited hereunder or otherwise held by Escrow Agent: (2) for any other indebtedness due Escrow Agent from Buyer from all right, title and interest of Buyer or for any other indebtedness due Escrow Agent from Seller from all right, title and interest of Seller in all of the documents and money deposited hereunder.

11. Direct that no notice, demand or change in these instructions shall be of effect unless given in writing and that these instructions, and any subsequent instructions, given mutually by Seller and Buyer to Escrow Agent in connection herewith shall constitute the complete escrow instructions, notwithstanding any agreement which Seller and Buyer may have concerning the property.

12. Direct that all money payable hereunder be paid to Escrow Agent. Disbursement of any funds may be made by check of Escrow Agent. Escrow Agent shall be under no obligation to disburse any funds represented by check or draft, and no check or draft shall be payment to Escrow Agent in compliance with any of the requirements hereof, until it is advised by the bank in which deposited that such check or draft has been honored, unless Escrow Agent specifically agrees in writing to accept liability for the sufficiency thereof. Income, if any, earned by money deposited herein shall be retained by Escrow Agent as additional compensation.

13. Authorize Escrow Agent to act upon any statement furnished by the holder or payee, or a collection agent for the holder or payee, of any lien on or charge or assessment in connection with the property, concerning the amount of such charge or assessment or the amount secured by such lien without liability or responsibility for the accuracy of such statement. Any transfer fee, statement fee, or service fee charged by any collection agent, holder or payee shall be paid by the Seller herein unless otherwise specified.

14. Direct that when these instructions have been complied with and Transamerica Title Insurance Company is willing to issue its title insurance policy, as hereinafter provided, and when Escrow Agent's charges have been paid, it shall deliver, by filing for record in the appropriate public office, all necessary documents required to be filed or recorded, instructing the County Recorder's Office to mail any documents recorded therein to the parties entitled thereto at the addresses given herein, at which time Escrow Agent shall disburse all funds paid to it hereunder, as provided herein. Any other papers or documents may, at the option of Escrow Agent, be delivered to the party entitled thereto by mailing in the manner herein provided for mailing of "Notices, Demands or Declarations". Escrow Agent may destroy its file and contents therein after three years from close of escrow or termination of collection, as appropriate. No action against Escrow Agent arising under these instructions shall be commenced more than three years from the date the cause of action accrues.

[43] 15. Agree that the employment of Transamerica Title Insurance Company, as Escrow Agent, shall not affect any rights to which it may be subrogated under the terms of any title insurance policy issued pursuant to the provision thereof.

CANCELLATION:

16. If either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.

17. When such written notice is delivered to Escrow Agent by the party so electing to cancel, Escrow Agent shall within three days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notices, Demands or Declarations.

18. In the event said other party shall fail within said thirteen-day period to comply with all the terms hereof, these instructions shall become cancelled and Escrow Agent is thereupon authorized:

19. First: To pay to the party electing to cancel, any earnest money deposited hereunder by said other party, after deducting any charges;

20. Second: To pay to said other party, any other money deposited hereunder by said other party, after deducting any charges remaining unpaid;

21. Third: To pay to the party electing to cancel, any money deposited by said party, after deducting any charges remaining unpaid;

22. Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of Escrow Agent.

23. If, under these instructions, a commission is to be paid to a real estate agent, then, notwithstanding any conflicting provisions herein contained:

(a) The party obligated to pay the commission shall not acquiesce in any mutual cancellation of these instructions without having first delivered said real estate agents written consent to Escrow Agent.

(b) Upon cancellation of these instructions for any reason, should any funds, after deducting Escrow Agent's charges, become payable to a party obligated hereunder to pay said commission, then Escrow Agent shall pay to the real estate agent therefrom, a sum equal to one-half of the earnest money deposited

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by any other party and payable to the party so obligated, but not more than the full amount of such commission.

[49] 24. If Escrow Agent is unable or
inwilling to comply with these instructions
for any reason other than cancellation as
iereinbefore provided, or if Transamerica
'itle Insurance Company is unwilling to
ssue any title insurance policy provided
for herein, Escrow Agent is directed to pay
he charges payable by Buyer from any money
leposited hereunder by Buyer, paying the
alance then remaining to Buyer, and to pay
he charges payable by Seller from any money
eposited hereunder by Seller, paying the
alance then remaining to Seller, and all
ocuments executed by one party only on
eposit with Escrow Agent shall be returned
o the parties who executed said documents.
utually executed instruments shall be
etained by Escrow Agent.

25. Notwithstanding any of the pro-
isions herein, Escrow Agent is hereby
nstructed that any payments of money due
nder a cancellation notice shall not be
ccepted unless said payment is tendered
n cash, certified or cashier's check, or
oney order. Personal checks are not to be
ccepted as payment in these circumstances
nless approved by the party seeking can-
ellation.

GREEMENT FOR SALE OF REAL PROPERTY:

26. Should any part of the amount
ovided to be paid by Buyer be evidenced
an agreement for sale, an executed copy
ereof, the deed herein provided to be
rnished by Seller, and such other docu-
nts as Escrow Agent may, in its sole

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judgment, require will be delivered by Seller and Buyer to Escrow Agent which shall record said agreement and hold said deed until such time as all sums due for the account of Seller under said agreement for sale have been paid and the instructions herein have been met, at which time Escrow Agent shall deliver said deed to Buyer. In the event of a default in the agreement terms, by Buyer, Seller and Buyer hereunder, their heirs, successors, and assigns, agree that Escrow Agent may forfeit all right, title and interest of Buyer in said agreement and real property by recordation of Affidavit of Completion of Forfeiture in accordance with procedures agreed by the parties in Escrow Instructions.

27. If Buyer is in default under such agreement, Seller may either elect to bring an action against Buyer for specific per- ormance of agreement or enforce a for- eiture thereof in any lawful manner, ncluding, but not limited to, forfeiture y notice as hereinafter provided. For- eiture may be enforced only after the xpiration of the following periods after uch default; where Buyer has paid on the urchase price: Less than 20% - 30 days; 0% or more, but less than 30% - 60 days; 0% or more, but less than 50% - 120 days; 0% or more - 9 months. In computing said ercentages, the amount of any agreement or sale or mortgage agreed to be paid by uyer shall be treated as payment only to he extent of principal actually paid there- n by Buyer.

28. If Seller elects to forfeit such greement by notice, Seller shall do so hrough Escrow Agent by delivering to Escrow gent a written Declaration of Forfeiture rected to Buyer together with Escrow

Agent's established fee for services rendered in connection with forfeitures. Said fee of Escrow Agent shall be the Buyer's obligation, shall be added to the contract balance owed by Buyer to Seller, shall be a lien upon the subject property and shall be collected by Escrow Agent [50] from Buyer in order for Buyer to avoid the forfeiture. Escrow Agent shall, within three days thereafter, send a copy of said declaration to Buyer in the manner provided herein for the mailing of Notices, Demands or Declarations. If Buyer fails to comply with the terms of such agreement to the date of such compliance before the expiration of ten days from the date said copy was deposited in the United States mail as herein provided, Escrow Agent is authorized to deliver to Seller the documents and money deposited under these instructions or under such agreement and file of record an Affidavit of Completion of Forfeiture executed by Escrow Agent, which affidavit shall be binding on all parties, their heirs, successors and assigns. All funds paid to Escrow Agent in compliance with the demands of any forfeiture notice served in connection with agreements for sale, shall be in the form of cash, cashiers check, or money order only. Personal checks will not be accepted. Said funds shall be paid to the office of Transamerica Title Insurance Company where escrow is being held. In the event any fee which is Buyer's obligation is not paid, said fee, at Escrow Agent's option, shall be deducted from funds due Seller and added to the contract balance owed Seller by Buyer. Seller may declare Buyer in default for nonpayment of said fees when due and enforce a forfeiture of said contract pursuant to the provisions contained herein.

29. In addition to the regular escrow charges made by Escrow Agent, Seller and Buyer will pay to Escrow Agent for its services in receiving, accounting for, remitting funds, terminating the account and in performing services in connection with the transmission of any Notices, Demand or Declaration required to be transmitted under the terms of the Escrow Instructions, or the agreement for sale and implementing the action contemplated or prescribed by any such Notice, Demand or Declaration, such reasonable fees as Escrow Agent has established for the various services to be performed. Said fees shall be paid one-half by Buyer and one-half by Seller unless otherwise specified herein. We reserve the right to make additional charges in unusual circumstances. All fees will be based on the rate in effect as of the date the various services are performed.

ACCOUNTING SERVICES:

30. Seller or Mortgagee as the payee of future installments which may be provided for in these instructions agrees to refund any remittance made by Escrow Agent in reliance on a check which is subsequently dishonored.

31. If a deferred balance is represented by a note secured by mortgage, the Mortgagee agrees to deposit a satisfaction of said mortgage with Escrow Agent for delivery to Mortgagor upon full payment of the note. The Mortgagee further agrees that if upon payment of said note in full you have not for any reason been furnished with a release executed by Mortgagee, you are authorized as Mortgagee's agent to mark the Promissory Note paid in full and cancelled and to execute and record a satisfaction of said mortgage.

32. In the event a note and mortgage is deposited with Escrow Agent for collection hereunder, the Mortgagee shall have the right to withdraw the note and mortgage or any modification thereof at any time without prior notice on payment of fees due Escrow Agent.

[51] 33. Time is of the essence of any agreement to pay or perform hereunder which agreement shall remain unpaid or unperformed as of close of escrow. No payment by Buyer or Mortgagor of such amounts shall be received or receipted for by Escrow Agent unless all amounts due as of the date of compliance are paid unless and until written authority therefor has been delivered to Escrow Agent by the payee of said amount.

34. No transfer or assignment of any rights hereunder shall be made by anyone having an interest herein unless made in such manner and accompanied by such instruments and fees as shall be required by the Escrow Agent.

NOTICES, DEMANDS OR DECLARATIONS:

35. The respective addresses of Seller and Buyer as set forth herein or the last notice of change thereof filed with Escrow Agent by the respective parties, shall be used by Escrow Agent in mailing any Notice, Demand or Declaration to either party.

36. If, for any reason, a Notice, Demand or Declaration of any kind is to be given by either party to the other party, said Notice, Demand or Declaration shall be in writing, signed by the party giving the Notice or making the Demand or Declaration and directed to the other party and shall be filed with Escrow Agent. Escrow

Agent shall within three days after receipt of said Notice, Demand or Declaration, send it to the party to whom it is directed by enclosing a copy of said instrument in an envelope addressed to said party at the last address which said party shall have filed with Escrow Agent, or, if no address has been so filed, to said party, in care of General Delivery, at the City in which the office of Escrow Agent is located as shown on the first page of these instructions, and depositing said envelope with proper postage affixed thereto in the United States mail.

37. The mailing of any such instrument by Escrow Agent in the manner herein provided shall constitute notice of the contents of such instrument to the party to whom the instrument is directed as of the date of such mailing and no further notice thereof shall be required.

DEFINITIONS:

38. The word "charges" as used herein, refers to all charges and advances made and obligations incurred by Escrow Agent in connection herewith, and all charges of Transamerica Title Insurance Company in connection with the issuance of its title insurance policy or the cancellation of any order therefor.

39. The word "property" as used herein, refers to the real property described in and which is the subject of these escrow instructions.

40. The word "party" as used herein, refers to Seller or Buyer as the case may be.

41. The phrase "Seller and Buyer" as used herein, refers to Seller and Buyer both jointly and severally unless otherwise specified.

[52] 42. The day provided herein within which compliance with any requirement must be met shall end at the close of the then regularly established public business hours of Escrow Agent for such day, provided, should Escrow Agent be closed during any of said business hours on said day such requirement may be met on the next succeeding day on which Escrow Agent is open for business throughout said business hours.

43. "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

TITLE INSURANCE:

44. The title insurance provided for herein, shall be subject to the conditions of and evidenced by the regular form of Owner's Title insurance policy of Transamerica Title Insurance Company with a limit of liability equal to the total amount to be paid by Buyer. Said policy, upon issuance, shall insure Buyer against loss by reason of defects in the title to the property on the date of filing for record of the documents as provided herein subject to such of the following exceptions as may be applicable in addition to the regular printed exceptions contained in Schedule "B" thereof:

(a) Taxes and assessments payable by Buyer as set forth herein;

(b) Building and other restrictive covenants to which property is subject;

(c) Easements and rights of way for roadways, canals, laterals, ditches and public utilities over and across the property;

(d) Mortgages referred to herein;

(e) Rights of parties under the agreement for sale referred to herein;

(f) Rights of Buyer under the agreement for sale provided for herein;

(g) Any liens or encumbrances affecting said property suffered or incurred through any act or fault of the party insured or anyone deriving an interest in said property by or through the said party insured;

(h) Liabilities and obligations imposed on the land by inclusion in any water or irrigation district;

(i) Reservations and Exceptions in Patents.

45. NOTE: There are some matters which Transamerica Title Insurance Company does not attempt to investigate or determine and for which it assumes no liability. While not a complete list, experience has shown that among these, the following deserve your particular consideration:

(a) Unrecorded mechanic's and material men's liens;

(b) Current personal property taxes;

[53] (c) Utility charges, such as electric, gas, water and sewer.

(d) Charges for irrigation water and power;

(e) Boundary lines, location of improvements and possession;

(f) Compliance with limitations on use of the property, such as zoning and building ordinances and building and other restrictions;

(g) Premiums for fire insurance policies provided for herein. (It is your obligation to determine that such premiums are paid and that such policies are in effect.)

(h) Reservations and exceptions in Patents, such, for example, as oil or mineral reservations. [54]

SCHEDULE "A" - To be attached and made a part of Escrow #02013111-7

BUYER to take possession at close of Escrow.

It is understood and agreed between Seller and Buyer that there is an existing mortgage on Parcel 2 in favor of Federal Land Bank which will remain the obligation of the Seller of Parcel 2. Seller agrees to have this mortgage released before or at the time Buyer pays off the deferred balance due under said James Stewart Company - Cocke mortgage. Seller further agrees to provide Buyer with Partial Releases on 5-acre tracts as agreed to in the James Stewart Company - Cocke mortgage.

The terms of the purchase money mortgage are as follows: $64,000.00 on January 2, 1969, plus interest on unpaid balance from date of closing and the balance to be paid over a period of not more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and including the regular annual payments, with the first such equal payment being due January 2, 1970. Buyer has the right and privilege to make additional payments at any time after January 2, 1969.

Seller agrees to execute and deliver to the escrow agent to be held in escrow, partial releases of mortgages in increments of 5-acre parcels, and the property may be released in the manner hereafter provided upon the following formula: $6,000.00 applied upon the principal for each acre

released paid upon the deferred balance due on the mortgage hereunder; EXCEPT that the property bordering on Priest Road a distance in depth of 600 feet shall bear a release price of $8,000.00 per gross acre. All releases are to be released in a contiguous manner, and the descriptions of said releases are to be furnished by a registered engineer. It is agreed between Seller and Buyer that the annual principal installments (EXCEPT the down payment of $64,000.00) shall apply toward the release price and the release prices paid for the release of land shall apply toward the next annual installment of principal. Except for annual payments of principal and interest, no interest charge shall be added to the release prices when Buyer obtains releases of lands hereunder.

These instructions and that certain Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale of the property described under the terms set forth herein.

The Broker's commission shall be 5% of the adjusted sales price, and shall be paid by Seller as follows: $10,000.00 upon the close of escrow, and one-half of the remaining balance to be paid from the principal payment due January 2, 1970, and the balance from the principal payment due January 2, 1971. The deferred commission shall bear interest under the same terms as the note and purchase money mortgage.

Sellers of Parcel 1 and mortgagees hereunder are Francis Cocke and Joan H. Cocke. Seller of Parcel 2 and mortgagee hereunder is Francis M. Cocke.

Escrow agent shall hold all releases of mortgage in ± 5 acre tracts to be executed by Seller or Sellers, depending on whether in Parcel 1 or Parcel 2, before close of escrow. Escrow agent shall keep account of all release credits, and shall apply any available release credit as instructed by Buyer, and turn executed releases over to Buyer as tracts are cleared by application of release credit, or by payment of the release price in the following manner: Tempe Branch, First National Bank of Arizona, shall hold for collection the note and mortgage. Buyer shall remit payments of principal and interest, and release payments to said Bank and shall designate tracts to be released, so that Bank may apportion said sums between the respective Sellers. Bank shall endorse said payments on the note as collected, and shall credit the amount thereof to one or both of Sellers as instructed by Sellers and shall issue a receipt to Buyer [55] for delivery to Escrow Agent. Escrow Agent shall thereupon deliver to Buyer the executed releases of the tracts paid for by Buyer, or shall record such releases upon instruction of Buyer.

APPROVED:

s/ Francis Cocke
FRANCIS COCKE, Seller

s/ Joan H. Cocke
JOAN H. COCKE, Seller

JAMES STEWART COMPANY
By
s/ Wallace O. Tanner
WALLACE O. TANNER, VICE PRESIDENT
Buyer

/s
A

/ Arleigh R. Burton
LEIGH R. BURTON, Broker [56]

LEGAL DESCRIPTION:

PARCEL NO. 1:

That property situated in the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, more particularly described as follows:

BEGINNING at a point on the East boundary line of said quarter Section, where said boundary line intersects the middle of an irrigation ditch being 323 1/2 feet South of the Northeast corner of said Quarter Section; thence running is a Southwesterly direction, following the middle line of said ditch to quarter-quarter Section line running North and South through the middle of said quarter Section; thence South, along said quarter Section line, 1287 feet to the North line of Jenkins Ditch; thence East, along said North boundary line of said Jenkins Ditch to a point on the East boundary line of said quarter Section 519 1/2 feet North of the Southeast corner thereof; thence North, along said boundary line to beginning;

EXCEPT any portion which may lie within the right-of-way of the Jenkins Ditch.

PARCEL NO. 2:

That part of the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, described as follows:

BEGINNING at the Northeast corner of the Southeast quarter of said Section 20 and running thence West, along the North line of said quarter section to the Northwest corner thereof; thence South, along the West line of said quarter section to the North bank of the Jenkins Ditch, a distance of 2090 feet, more or less; running thence East, along the North bank of the Jenkins Ditch to the quarter quarter Section line running North and South through the middle of said quarter section; thence North, along said quarter quarter section line to the center of the Cosner Ditch, also known as George Ditch, a distance of 1287 feet, more or less, running thence Easterly, along the middle of said Cosner Ditch and following the meanderings thereof to the East line of said quarter section; thence running North along said East line to the Northeast corner of said quarter section, a distance of 323 1/2 feet, more or less, to the point of commencement;

EXCEPTING THEREFROM, the following one-acre tract;

BEGINNING at the point of intersection of the North-South mid-section line of said Section 20 with the aforesaid Northerly right-of-way line of the Jenkins Ditch, said point being North 0 degrees 05 minutes 25 seconds East, 584.12 feet from the South quarter corner of said Section 20; thence North 85 degrees 05 minutes 25 seconds East, along said Northerly right-of-way line of Jenkins Ditch, a distance of 240.85 feet; thence South 89 degrees 22 minutes 35 seconds East, continuing along said Northerly right-of-way line, a distance of 131.69 feet; thence North 56 degrees 56 minutes 50 seconds West,

310.37 feet; thence North 34 degrees 59 minutes 16 seconds West, 150 feet; thence South 89 degrees 54 minutes 35 seconds West, 25 feet to the aforesaid North-South mid-section line of Section 20; thence South 0 degrees 05 minutes 25 seconds West, along said North-South mid-section line, a distance of 311.39 feet to the point of beginning, being that certain property named in Condemnation Proceedings in Cause No. 183278 in the Superior Court of the State of Arziona, County of Maricopa, entitled State of Arizona, Arizona State Highway Department, Plaintiff -vs- Francis M. Cocke, et al, Defendants, Lis Pendens of which was dated December 28, 1965, recorded January 7, 1966 in Docket 5874, Page 566; and

EXCEPT any portion of said property which may lie within the right-of-way of the Jenkins Ditch.

[57]

Transamerica Title Insurance Co.
P.O. Box 13028
Phoenix, Arizona

Re: Joan H. Cocke Trust No. 90497,
Escrow No. 02013111-7

Gentlemen:

Enclosed is a Special Warranty Deed from First National Bank of Arizona, as Trustee, to James Stewart Company which was prepared at the request of Joan H. and Francis M. Cocke.

Please place this deed in Escrow No. 02013111-7 in connection with the consummation of a sale of the subject property in accordance with escrow instructions executed by the parties and in accordance with further instructions governing the distribution of the proceeds of the sale to be furnished to your company, as escrow agent, by Joan H. Cocke and Francis M. Cocke.

Very truly yours,

FIRST NATIONAL BANK OF
ARIZONA
By
/s/ George Hastings
Its: Assistant Trust
Officer

[58] WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations,

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

(PARCEL NO. 2), That part of the Southeast Quarter (SE¼) of Section Twenty (20) Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona; described as follows:

Beginning at a point on the North line of said SE¼ of Section 20 which bears S.89° 43'55"W. 528.00 feet from the Northeast corner of said SE¼ of Section 20; thence S.0°20'41"E. 435.44 feet to the middle of the George Ditch; thence S.76°59'43"W. 236.29 feet along the middle of the George Ditch; thence S.67°40'43"W. 211.50 feet along the middle of the George Ditch; thence S.68°31'41"W.399.54 feet along the middle of the George Ditch to a point on the West line of the E½ SE¼ of said Section 20; thence S.0°07'25"E. 1381.50 feet along the West line of the E½ SE¼ of said Section 20 to a point on the North bank of the Jenkins Ditch; thence N.88°40'37"W. 463.68 feet along the North bank of the Jenkins Ditch; thence N.89°08'43"W. 481.97 feet along the North bank of the Jenkins Ditch; thence N. 0°51'17"E. 9.00 feet; thence N.56°56'50"W. 328.73 feet; thence N.34°59'16"W. 150.00 feet; thence S.89°54'35"W. 25.00 feet to a

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point on the West line of said SE¼ of Section 20; thence N.0°05'25"E. 1757.73 feet along the West line of said SE¼ of Section 20 to the Northwest corner of said SE¼ of Section 20; thence N.89°43'55"E. 2121.23 feet along the North line of said SE¼ of Section 20 to point of beginning, containing 72.3284 acres within the limits of the City of Tempe and subject to existing rights of way and easements for roads, ditches, and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the fee title against all persons whomsoever.

Dated this 30 day of December, 1968

/s/ FRANCIS M. COCKE

STATE OF ARIZONA)
: ss.
County of Maricopa)

This instrument was acknowledged before me this 30 day of December, 1968, by

/s/ Mrs. Cecilia J. Burton
Notary Public

My commission expires:
12/12/69

[59]

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt Riber Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, on account of land in Agricultural Improvement District No. 2 and Drainage District No. 2.

5. Controlled right of access to Interstate Highway referred to in Civil No. 183278; Lis Pendens recorded in Docket 5874, page 566.

6. Mortgage executed by Francis M. Cocke to The Federal Land Bank of Berkeley to secure an indebtedness of $____________

and other amounts payable thereunder, recorded April 14, 1966 in Docket 6004, page 97, which Francis M. Cocke has agreed to pay.

Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____________, and other amounts payable thereunder, dated ________________________, recorded ____________ ____________ in Docket ________________________, page _____________.

[60] WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations,

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

An undivided one-half (½) interest in 49.5023 acres of land within the limits of the City of Tempe described as follows:

(PARCEL NO. 1) That part of the East half (E½) of the Southeast quarter (SE¼) of Section twenty (20), Township one (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at a point on the East line of said E½ SE¼ of Section 20, where said East line intersects the middle of the George Ditch, which bears S.0°20'17"E. 323.50 feet from the Northeast corner of said E½ SE¼ of Section 20; thence S.0°20'17"E. 1806.47 feet along the East line of said E½ SE¼ of Section 20 to the North bank of the Jenkins Ditch; thence N.88°40'37"W. 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said E½ SE¼ of Section 20; thence N.0° 07'25"W. 1381.50 feet along the West line of said E½ SE¼ of Section 20 to the middle of the George Ditch; thence N.68°31'41"E. 399.54 feet along the middle of the George Ditch; thence N.67°40'43"E. 211.50 feet along the middle of the George Ditch;

thence N.76°59'43"E. 375.20 feet along the middle of the George Ditch; thence N. 80°57'10"E. 195.15 feet along the middle of the George Ditch; thence N.75°14'43"E. 206.00 feet along the middle of the George Ditch to the point of beginning, subject to existing rights of way and easements for roads, ditches and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the fee title against all persons whomsoever.

Dated this 30 day of December, 1968.

/s/ FRANCIS M. COCKE

STATE OF ARIZONA)
: ss.
County of Maricopa)

This instrument was acknowledged before me this 30 day of December, 1968, by

/s/ Mrs. Cecila J. Burton
Notary Public

My commission expires:
12/12/69

[61]

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt River Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, an account of land in Agricultural Improvement District No. 2 and Drainage District No. 2.

5. Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $__________________, and other amounts payable thereunder, dated_____________, recorded___________________in Docket _________________, page__________________.

74-1532

Supreme Court, U. S.
FILED
JUN 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. A-812

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

(Two Volumes)

RICHARD ANTHONY JOHNSON
132 South Central Ave.
Suite 7
Phoenix, Arizona 85004

Counsel for Petitioner

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Pages 88 - 172

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[62]

Phoenix, Arizona
Date: March 5, 1969
Escrow No. 02013111-7
Office: Main Office

James Stewart Company,
M. Seth Horne and Maurine D. Horne
c/o Wallace Tanner, Atty.
Suite 913, 3800 N. Central
Phoenix, Ariz. 85012

and
Transamerica Title Insurance Company
Escrow Agent

Gentlemen:

The instructions in the above numbered escrow having been dated October 9, 1968, and more than the time limit allowed therein having elapsed since said date, and ~~Seller~~ (Buyer) named in said escrow instructions having failed to comply with the terms thereof, the undersigned elects to cancel the escrow.

The undersigned, therefore, delivers this notice to the Escrow Agent demanding that if ~~Seller~~ (Buyer) has not complied with all of the terms of said escrow instructions within thirteen days from the date of receipt of this notice by the said Escrow Agent, said escrow shall thereupon become cancelled.

Notwithstanding any of the provisions herein, Escrow Agent is hereby instructed that any payments of money due under a cancellation notice shall not be accepted unless said payment is tendered in cash, certified or cashier's check, or money order. Personal checks are not to be accepted as

payment in these circumstances unless approved by the party seeking cancellation. Compliance shall be met at the office shown above.

Yours very truly,

/s/ FRANCIS M. COCKE

Received by Transamerica Title Insurance Company this 5 day of March , 1969.

/s/ H. KAVANAUGH
Escrow Officer

Form B-7 Rev. 1-68

[63]

TRANSAMERICA TITLE INSURANCE COMPANY

Date: March 6 1969

Escrow No. 02013111-7

JAMES STEWART COMPANY
C/o Wallace Tanner, Attorney
Suite 913
3800 North Central Ave.
Phoenix, Arizona 85012

Gentlemen:

The (Seller) (**Buyer**) under the above numberedescrow has today served us with a notice of cancellation thereof, an executed copy of which is enclosed.

Such notice having been given, you must comply with all of the terms of the escrow on or before March 19 1969, otherwise, as Escrow Agent, we must comply with the enclosed notice and the demands therein made.

Very truly yours,

TRANSAMERICA TITLE
INSURANCE COMPANY

By /s/ H. Kavanaugh
Escrow Officer

Form B-13

[64]

TANNER, JARVIS, & OWENS
Attorneys at Law
913 Del Webb Building
3800 North Central Avenue
Phoenix, Arizona 85012

March 5, 1969

TRANSAMERICA TITLE INSURANCE CO.
114 West Adams
Phoenix, Arizona

Attention: Mr. H. Kavanaugh
Escrow Officer

Re: Escrow No. 02013111-7

Gentlemen:

There has previously been submitted to you the down payment due in October 1968 on the above excrow. This down payment in the sum of $44,000 was the balance remaining after payment of $20,000 which was paid to the sellers outside of escrow. Twenty thousand dollars of the $44,000 on deposit was also paid directly to Francis M. Cocke to apply on his share of the down payment. It is my understanding that Mr. and Mrs. Cocke have reached an agreement as to the way these funds are to be distributed and also an agreement as to the distribution of the $64,000 payment which will be due upon this escrow being closed. According to the information we have received, they have agreed to a split of $32,000 to each of the parties. The only matter which seems to be in contention is whether Mrs. Cocke will receive

the payment directly or whether the payment will be set up in some kind of trust agreement. It is apparently the position of Mrs. Cocke that the payment is to be made to her directly and it is apparently the position of Mr. Cocke that the payments are to be maintained in some sort of trust arrangement. The buyers are not directly concerned with how Mr. and Mrs. Cocke make this division; however, the buyers are vitally concerned that some arrangement be made so that the escrow can close and and a means be provided for crediting sums to the purchase price and a means provided for obtaining parcel releases as required by the buyers.

Releases have been provided for all the acreage except parcels 1A and 2A which we understand are to be deeded to the buyers at close of escrow. The parcel releases properly executed by both Francis M. Cocke and Joan H. Cocke are to be held by the title company and released to the buyers [65] as payments are made to the First National Bank of Arizona.

Enclosed you will find the buyer's checks each in the sum of $32,000 made payable to the First National Bank of Arizona in conformity with the agreement made by Mr. and Mrs.Cocke concerning the distribution of the funds from this payment. You are authorized to deliver these sums to the First National Bank when you have accomplished the following:

1. Closed the escrow in conformity with the original agreement. Buyers' funds have been on deposit for many months and the only reason that this escrow has not been closed has apparently been the inability of the sellers to agree how pay-

ment will be distributed. This was not part of the original agreement since the buyers assumed no responsibility for this item.

2. Issued your standard title insurance policy in conformity with the agreement to the buyers.

3. Have in your possession ready for delivery to buyers each of the partial releases of mortgage submitted to you.

4. Have recorded the deeds and mortgages which deed is to include a deed to parcels 1A and 2A to the buyers.

5. Have instructions from the sellers in your possession which assures you and the buyers that upon payment by the buyers of payments hereunder that these sums will be accepted by First National Bank in conformity with the agreement and that the First National Bank will issue receipts which will be acceptable to Transamerica to apply toward release credits herein.

As stated previously, the buyers do not want to become involved in any conflict between the sellers and do not desire to take a position in any way regarding their internal handling of the payments. In conformity with the instructions which have been received and the contract, there is herewith submitted to you three (3) promissory notes and three (3) mortgages which reflect the balance due to the sellers after the annual payment which is submitted herewith. If the sellers do not desire to have the mortgages and promissory notes in the sums set forth herein or have any changes which [66] are acceptable to the title company

and to the First National Bank and which do not in any way affect buyers' rights under the agreement, buyers will be glad to cooperate in any way in accomplishing the result desired by the sellers.

If you have any questions please contact our attorney Wallace O. Tanner, 913 Del Webb Building, Phoenix, Arizona 85012.

Very truly yours,

/s/ M. S. Horne
M. S. Horne
/s/ Maurine D. Horne
Maurine D. Horne

Received this 7th day of March 1969
TRANSAMERICA TITLE INSURANCE COMPANY

By:/s/ H. Kavanaugh
Escrow Officer

Deposited in the United States Mail
this 10th day of March, 1969
TRANSAMERICA TITLE INSURANCE COMPANY

By:/s/ H. Kavanaugh
Escrow Officer

[67]

TRANSAMERICA TITLE INSURANCE COMPANY

March 10th, 1969
Escrow #02013111-7

Mr. Francis Cocke
1320 South Priest Road
Tempe, Arizona

Dear Mr. Cocke:

Enclosed is a letter that we have received from the Buyer relative to the above numbered escrow. Also, this is to acknowledge that we have received the various checks and documents mentioned in said letter.

It appears to the undersigned that the Buyer has done everything that is required of him to close this escrow.

Yours very truly

/s/ H. KAVANAUGH
Escrow Officer

HK/L

c.c.- Joan H. Cocke
Attention: Loretta Whitney

c.c - Arleigh R. Burton
130 East 14 Street
Tempe, Arizona

c.c - Walace O. Tanner
913 Del Webb Building
Phoenix, Arizona

[68]

November 27, 1972

Mr. Ray Martin, Manager,
Home Office Escrow Dept.
Transamerica Title Insurance Company
114 West Adams Street
Phoenix, ARizona 85003

Mrs. Loretta S. Whitney
Attorney-at-Law
603 Luhrs Building
Phoenix, Arizona 85003

Re: Escrow No. 02013111-7

Gentlemen:

This letter will confirm our agreement that the deposit this date of Thirty-Two Thousand and No/100 ($32,000.00) Dollars in the above-numbered escrow by James Stewart Co., an Arizona corporation, and M. Seth Horne and Maurine D. Horne constitutes full and complete compliance with regard to the second installment of $64,000.00 due under that contract dated October 9, 1968, and constitutes compliance to date of the obligation of said parties under and pursuant to the Judgment entered in James Stewart Co., an Arizona corporation, et al, vs Francis M. Cocke, C-222472, and a certain escrow with Transamerica Title Insurance Company Escrow No. 02013111-7.

It it further agreed by all the parties hereto that the deposit of said $32,000.00 represents the required sum to be deposited in escrow after offsets permitted and required by the aforesaid Judgment, and after due regard and calculation

of the equal one-half interest by Joan H. Cocke and Francis M. Cocke in the parcel to which the said $32,000.00 is to be applied.

It is further agreed by all of the parties hereto that the deposit of the aforesaid $32,000.00 with Transamerica Title Insurance Company is to be immediately re-deposited in a savings account with United Bank and to draw normal interest thereon at the rate of interest paid on ordinary savings accounts.

This deposit is being based upon the opinion of Kelly and Corbin, Lawyers, that the period for appeal for Francis M. Cocke expires at the conclusion of the business day, November 27, 1972. In the event the said Francis M. Cocke thereafter appeals from the aforesaid Judgment and is successful in sustaining appellate jurisdiction, then you shall release the $32,000.00 transmitted herewith pending Mr. Cocke's appeal.

JAMES STEWART CO., an Arizona Corportaion

M. SETH HORNE

MAURINE D. HORNE

By and through their Attorney:

/s/ Hubert E. Kelly
Hubert E. Kelly

JOAN H. COCKE

By and through her attorney:

/s/ Loretta S. Whitney
Loretta S. Whitney

TRANSAMERICA TITLE INSURANCE COMPANY

By and through its authorized agent:

/s/ Raymond B. Martin
Raymond B. Martin, Manager
Home Office Escrow Department

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August 29, 1973

RTIFIED MAIL
TURN RECEIPT REQUESTED

ansamerica Title Insurance Company
O. Drawer 13028
oenix, Arizona 85002

tention: Mrs. Marie Peipelman,
Escrow Officer

tention: Mrs. Frances Bumsted Mitchell,
Legal Department

Re: James Stewart Co.,
M. Seth Horne and
Maurine D. Horne v.
Francis M. Cocke
Maricopa County,
Arizona,
Superior Court Cause
No. C-22472

Demand for Compliance with
Second Amended Judgment
Entered and filed by the
Superior Court of the
County of Maricopa on
September 27, 1972.

tlemen:

As you know, the plaintiffs in the
ve action were awarded judgment against
ncis M. Cocke on September 27, 1972.
s judgment provided, among other things,
t the property which is the subject of
r Excrow No. 02013111-7 be conveyed to
plaintiffs. From that judgment, de-

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endant Francis M. Cocke appealed, which
ppeal was dismissed on May 17, 1973.
hereafter, on June 13, 1973, the Court
enied a motion for rehearing on its order
ismissing the appellant's appeal dated
ay 17, 1973. From that order Mr. Cocke
d not [70] file a petition for review
thin the time prescribed by Rule 47(b)
the Arizona Supreme Court Rules, and
e litigation involving the property cov-
red by your Escrow No. 02013111-7 is now
ncluded.

As you also know, in early January
73, representatives of the plaintiffs
ere in your office, at which time they
nferred with Mr. Martin, to whom this
crow was then assigned. And, at that
me the plaintiffs deposited with Trans-
erica Title additional funds which were
en deemed necessary by the plaintiffs
d the agent of Transamerica Title to com-
y with the terms of the contract and es-
ow involved in this case in the event
. Cocke's appeal was untimely, as it was
timately decided to be.

Upon conclusion of the litigation by
e denial of the motion for rehearing
d Mr. Cocke's failure to file a petition
r review with the Supreme Court, repres-
tatives of encouraging Transamerica Title
proceed with the closing of the escrow.
ereafter, on July 17, 1973, July 31, 1973,
d August 14, 1973, the undersigned, as
unsel for the James Stewart Co., M. Seth
rne and Maurine D. Horne, his wife, dir-
ted correspondence to you urging you to
mply with your contractual obligations
d proceed with the closing of this es-
ow without further delay.

I have recently been informed by Mr.

Powell B. Gillenwater, the attorney for Transamerica Title Insurance Company, that it is your position that you will not comply with your contractual obligations by closing Escrow No. 02013111-7 even though there is a valid existing judgment of the Superior Court of Arizona in favor of the above plaintiffs directing, among other things, that they are to receive conveyance of the property which is the subject of this escrow.

As counsel for the above-named plaintiffs, I hereby demand that you proceed to honor your contractual obligations and close Escrow No. 02013111-7. In the event you do not take action immediately, I will proceed on behalf of the plaintiffs for such relief as is permissible in the [71] premises under Rules 70 and 71 of the Arizona Rules of Civil Procedure. Furthermore, I will hold Transamerica Title Insurance Company responsible for any and all damages resulting to James Stewart Co. and M. Seth Horne and Maurine D. Horne, his wife, or any of them, by reason of your unilateral failure to honor the contractual obligations of Escrow No. 02013111-7.

Very truly yours,

HEK:lh
cc: Mr. Powell B. Gillenwater
Browder & Gillenwater
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

[72] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al,

Plaintiffs,

vs.

FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman,

Defendants,

vs.

TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation,

Additional Defendant on Counterclaim.

No. C 222472

SUMMARY JUDGMENTS

(Filed: 11/10/70)

This matter having come on regularly to be heard on October 22, 1970, on the motion of Transamerica Title Insurance Company for summary judgment in its favor on the counterclaim of Francis M. Cocke, and for Transamerica's motion for summary judgment in its favor against the defendant Cocke for Attorney's fees and costs incurred by Transamerica; and the defendant Cocke having been present in person and both parties having been represented by counsel, and extensive memoranda having been filed herein, and the Court having reviewed the same and having heard oral argument in reference to both motions, and the Court having held an additional hearing on October 22, 1970, for the purpose of determining the amount of reasonable

attorney's fees and costs due Transamerica Title Insurance Company and determining the motion for rehearing of Francis M. Cocke, and evidence having been presented as to the necessity and reasonableness of attorney's [73] fees incurred, and the oral argument having been presented on the motion for rehearing, and the Court being fully advised in the premises, now therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that there are no genuine issues of fact and that Transamerica Title Insurance Company is entitled to and hereby is awarded summary judgment against the defendant Francis M. Cocke on his counterclaim against Transamerica Title Insurance Company. It is

FURTHER ORDERED, ADJUDGED AND DECREED that there is no genuine issue of fact except as to the amount of attorney's fees, which has been determined at a hearing provided therefor, and that Transamerica Title Insurance Company is entitled to summary judgment on its counterclaim against the defendant Cocke for attorney's fees in the amount of $4,568.00 and its partial costs incurred herein in the amount of $104.71, and Transamerica Title Insurance Company is hereby granted leave to file a statement of costs for depositions and other costs incurred in connection with this action after the entry of this formal written judgment. It is

FURTHER ORDERED, ADJUDGED AND DECREED that the motion for rehearing filed herein by the defendant Cocke in reference to the summary judgments herein provided be and the same hereby is denied. It is

FURTHER ORDERED, ADJUDGED AND DECREED that although there are multiple claims and multiple parties, there is no just reason for delay in the entry of this judgment, and the Court does hereby pursuant to Rule 54(b) Rules of Civil Procedure, expressly direct the entry of this judgment.

DATED this 10th day of November, 1970.

s/ Irwin Cantor
Irwin Cantor
Judge of the Superior Court

[74]
The original of the foregoing Judgment lodged with the Honorable Irwin Cantor this 22nd day of October, 1970, and copies thereof delivered to the following on the 22nd day of October, 1970:

L. Alton Riggs, Jr.
Johnson Shelley Roberts & Riggs
Attorneys for Defendant Cocke
48 N. Macdonald
Mesa, Arizona 85201

Wallace O. Tanner
Tanner Jarvis Owens & Hoyt
Attorneys for James Stewart Co.,
M. Seth Horne and Maurine D. Horne
913 Del Webb Building
Phoenix, Arizona 85012

Loretta Whitney
Attorney for Joan H. Cocke
603 Luhrs Building
Phoenix, Arizona 85003

George Sorenson, Jr.
Minne & Sorenson
Attorneys for Elizabeth C. Cocke and
Dorothy J. Cocke, and Guardian Ad Litem
of Elizabeth Cocke
609 Luhrs Building
Phoenix, Arizona 85003

s/ Powell B. Gillenwater
Powell B. Gillenwater

[75] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants, vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant on Counterclaim.	No. C 222472 (Filed: Nov 1970)

JUDGMENT IN FAVOR OF CROSS-DEFENDANT, JOAN H. COCKE AND AGAINST CROSS-CLAIMANT FRANCIS M. COCKE

This matter having come on regularly to be heard on September 2, 1969, and the Court having ordered that the motion of the defendant, Joan H. Cocke, to dismiss the cross-claim of the defendant, Francis M. Cocke, on the grounds of lack of jurisdiction and failure to state a claim shall be held in abeyance until the amended pleading by the defendant, Francis M. Cocke, has been filed; and Joan H. Cocke having been allowed ten (10) days after the filing of the amended pleading by the defendant, Francis M. Cocke, to file any response to the amended pleading filed by the defendant, Francis M. Cocke; and

the defendant, Francis M. Cocke, having failed to amend his cross-claim against the cross-defendant, Joan H. Cocke; and Joan H. Cocke having filed a new motion for judgment in her favor as cross-defendant and against the cross-claimant, Francis M. Cocke, on the 2nd day of October, 1969; and the Court having ordered that said new motion be heard on November 20, 1969, and said hearing having been duly continued by said Court to November 28, 1969; and said hearing on the motion for judgment in favor of the cross-defendant, Joan H. Cocke, and [76] against the cross-claimant, Francis M. Cocke, having come on regularly for hearing with the motions of other parties in said action on November 28, 1969; and all parties being present and additional memorandums being filed by cross-claimant, Francis M. Cocke, and oral arguments having been heard on said date, the Court took under advisement the motion for judgment of the cross-defendant, Joan H. Cocke, in her favor and against the cross-claimant, Francis M. Cocke; and on December 1, 1969, the Court being fully advised in the premises entered an Order granting the motion for judgment in favor of the cross-defendant, Joan H. Cocke and against the cross-claimant, Francis M. Cocke,

NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED that the motion for judgment in favor of the cross-defendant, Joan H. Cocke, and against the cross-claimant, Francis M. Cocke, be, and the same hereby is, granted; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that although there are multiple claims and multiple parties, there is no just

reason for delay in the entry of this judgment, and the Court does hereby, pursuant to Rule 54(b) Rules of Civil Procedure, expressly direct the entry of this judgment.

DATED THIS ____ day of November, 1970.

/s/ Irwin Cantor
Irwin Cantor
Judge of the Superior Court

The original of the foregoing Judgment lodged with the Honorable Irwin Cantor this ____ day of November, 1970, and copies thereof delivered to the following on the _____ day of November, 1970:

L. Alton Riggs, Jr.
Johnson Shelley Roberts & Riggs
Attorneys for Defendant Cocke
48 North Macdonald
Mesa, Arizona 85201

[77]
Wallace O. Tanner
Tanner Jarvis Owens & Hoyt
Attorneys for James Stewart Co.,
M. Seth Horne and Maurine D. Horne
913 Del Webb Building
Phoenix, Arizona 85012

Powell B. Gillenwater
Browder Gillenwater & Daughton
Attorney for Transamerica Title
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

George Sorrenson, Jr.
Minne & Sorenson
Attorneys for Elizabeth C. Cocke and
Dorothy J. Cocke, and Guardian Ad Litem

of Elizabeth Cocke
609 Luhrs Building
Phoenix, Arizona 85003

____
Loretta S. Whitney

[78] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al, Plaintiffs, vs. FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman, Defendants. vs. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation, Additional Defendant on Counterclaim.	No. C 222472 (Filed: 7/26/72)

PLAINTIFFS' AMENDED PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND SECOND AMENDED JUDGMENT

COMES NOW the Plaintiffs, and pursuant to the order of this Court dated April 20, 1972, submits hereby its amended proposed finds of fact, conclusions of law and second amended judgment.

FINDINGS OF FACT

The Plaintiffs propose that the Court make, from the evidence, the following findings of fact.

1. On October 9, 1968, JAMES STEWART COMPANY, hereinafter referred to as STEWART, entered into a real estate contract and

escrow agreement to purchase approximately 124 acres of land from the Defendant FRANCIS M. COCKE, hereinafter referred to as COCKE, and JOAN H. COCKE.

[79] 2. STEWART subsequently assigned its contractual rights to M. SETH HORNE and MAURINE D. HORNE, hereinafter referred to as HORNES.

3. Under the terms of the contract, the sales price for the property was $558,000 payable $20,000 upon the signing of the contract; $44,000 on or before December 1, 1968; $64,000 on January 2, 1969, plus interest on the unpaid balance from the date of closing; and the balance to be paid over a period of not more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and included in the regular annual payments, with the first such equal payment being due January 2, 1970. The sales price for the property was ultimately reduced to $548,238.15 based upon a survey by a registered engineer to determine the exact description and acreage. The sales price and mortgage amounts were to be adjusted on the basis of that survey at $4,500 per gross acre.

4. The unpaid balance was to be secured by a note and mortgage of Plaintiffs to the Defendants COCKE and JOAN H. COCKE, who agreed to execute partial releases of the mortgages in increments of 5-acre parcels upon payment of $6,000 per acre, except for that portion of the property bordering on Priest Road a distance in depth of 600 feet which bore a release price of $8,000 per acre. The Plaintiffs had the right of pre-payment at any time

after January 2, 1970.

5. At the time that the real estate contract and escrow instructions were entered into, COCKE was informed that the property was being acquired for the purposes of development.

6. Pursuant to the contract, on October 9, 1968, the Plaintiffs paid the Defendant COCKE and JOAN H. COCKE $20,000 and on December 11, 1968, they paid into escrow with the Transamerica Title Insurance Company $44,000 of which $20,000 was [80] paid out of escrow to the Defendant COCKE on or about January 10, 1969.

7. Plaintiffs have been ready at all times to close this transaction since December 15, 1968, the date set forth in the escrow instructions, or any time thereafter.

8. Also, Defendant JOAN H. COCKE has been ready to perform since December 15, 1968, and thereafter, and has admitted her obligation to perform under the contract.

9. COCKE has refused to convey the property to STEWART or to the HORNES.

10. As a result of COCKE's failure to convey as provided by the contract, Plaintiffs incurred damages as follows:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

11. These damages were incurred by Plaintiffs because of Defendant COCKE's failure to convey, and are costs which were preliminary to the development of the property, and are no longer usuable or otherwise recoverable by Plaintiffs.

12. These preliminary costs incurred by Plaintiffs were within the contemplation of Defendant COCKE at the time the contract of October 9, 1968, was entered into.

13. On December 8, 1970, this Court granted the Plaintiffs' motion for summary judgment awarding Plaintiffs specific performance of the contract dated October 9, 1968, against Defendant COCKE.

14. However, since December 8, 1970, COCKE has refused and still refuses to convey the property which he and JOAN H. COCKE agreed to sell to STEWART and which he had been ordered to convey by the Court.

CONCLUSIONS OF LAW

The Plaintiffs propose that the Court make the following [81] conclusions of law:

1. That Plaintiffs are entitled to specific performance against the Defendant COCKE as ordered by the Court on December 8, 1970, granting the Plaintiffs' motion for summary judgment.

2. The damages incurred by Plaintiffs in the sum of Forty-seven Thousand Four and 86/100 Dollars ($47,004.86), consisting of:

CONSULTING AND ARCHITECTUAL FEES

- \$ 6,349.00

SALARIES AND OFFICE OVERHEAD

- \$18,895.86

INTEREST ON MONEY IN PROJECT

- \$21,760.00

were incurred as a result of Defendant FRANCIS M. COCKE's failure to convey to Plantiffs, said damages being within the contemplation of Defendant FRANCIS M. COCKE at the time he entered into this transaction.

3. That Plaintiffs have and recover their costs of suit herein against the Defendant FRANCIS M. COCKE in the amount of One Thousand Four Hundred Sixty-three and 51/100 Dollars (\$1,463.51).

Respectfully submitted,
KELLY and CORBIN
By
/s/ Hurbert E. Kelly
Hubert E. Kelly
3003 N. Central
Suite 2300
Phoenix, Arizona 85012
Attorneys for Plaintiffs

Copy of the foregoing lodged with the Court this 26th day of July, 1972, and mailed same date to:

Powell B. Gillenwater
Browder & Gillenwater
Attorneys for Transamerica Title

3003 N. Central, Suite 2304
Phoenix, Arizona 85012

Loretta Whitney
Attorney for Joan H. Cocke
603 Luhrs Building
Phoenix, Arizona 85003

George Sorenson, Jr.
Attorney for Dorothy H. Cocke
  and Elizabeth C. Cocke
609 Luhrs Building
Phoenix, Arizona 85003

L. Alton Riggs, Jr.
Attorney for F. M. Cocke
48 N. Macdonald Street
Mesa, Arizona 85021

s/Hubert E. Kelly
Hubert E. Kelly

[83] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMAPNY, An)
Arizona Corporation; et al,)
)
Plaintiffs,)
vs.)
)
FRANCIS M. COCKE, a divorced)
man, and JOAN H. COCKE, a) No. C 222472
divorced woman,)
) (Filed:
Defendants.) 9/27/72)
vs.)
)
TRANSAMERICA TITLE INSURANCE)
COMPANY OF ARIZONA, An Arizona)
Corporation,)
)
Additional Defendants)
on Counterclaim.)
)

SECOND AMENDED JUDGMENT

This cause seeking specific performance of an agreement for the purchase and sale of certain real estate located in the State of Arizona, County of Maricopa, legally described as:

> PARCEL NO. 1: That part of the East half of the South east quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:
>
> BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said

East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the [84] George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of

Section 20 which bears South 89° 43' 55" West 528.00 feet from the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481.97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23 feet along the North line of said Southeast quarter of Section 20 to the point of beginning.

a copy of said agreement being attached to the complaint, and damages, the specific performance having been granted by the Court on December 8, 1970, against the Defendant FRANCIS M. COCKE upon the Plaintiff's motion for summary judgment, and the question of damages coming on regularly for trial before the Court sitting without a jury, commencing on the 28th day of February, 1972, Plaintiffs appearing by their attorneys, HUBERT E. KELLY and CHARLES L. ARNOLD, the Defendant FRANCIS M. COCKE appearing by and through his attorney, L. ALTON RIGGS, JR., and the Defendant JOAN H. COCKE appearing by and through her attorney, LORETTA WHITNEY, and the Court having heard the testimony and having examined the proof offered by the respective parties, and having taken this matter under [85] advisement finds, to-wit:

1. On October 9, 1968, JAMES STEWART COMPANY hereinafter referred to as STEWART, entered into a real estate contract and escrow agreement to purchase approximately 124 acres of land from the Defendant FRANCIS M. COCKE, hereinafter referred to as COCKE, and JOAN H. COCKE.

2. STEWART subsequently assigned its contractual rights to M. SETH HORNE and MAURINE D. HORNE, hereinafter referred to as HORNES.

3. Under the terms of the contract, the sales price for the property was $558,000 payable $20,000 upon the signing of the Contract; $44,000 on or before December 1, 1968; $64,000 on January 2, 1969, plus interest on the unpaid balance from the date of closing; and the balance to be paid over a period of not

more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and included in the regular annual payments, with the first such equal payment being due January 2, 1970. The sales price for the property was ultimately reduced to $548,238.15 based upon a survey by a registered engineer to determine the exact description and acreage. The sales price and mortgage amounts were to be adjusted on the basis of that survey at $4,500 per gross acre.

4. The unpaid balance was to be secured by a note and mortgage of Plaintiffs to the Defendants COCKE and JOAN H. COCKE, who agreed to execute partial releases of the mortgages in increments of 5-acre parcels upon payment of $6,000 per acre, except for the portion of the property bordering on Priest Road a distance in depth of 600 feet which bore a release price of $8,000 per acre. The Plaintiffs had the right of pre-payment at any time after January 2, 1970.

[86] 5. At the time that the real estate contract and escrow instructions were entered into, COCKE was informed that the property was being acquired for the purposes of development.

6. Pursuant to the contract, on October 9, 1968, the Plaintiffs paid the Defendants COCKE and JOAN H. COCKE $20,000 [87] and on December 11, 1968, they paid into escrow with the Transamerica Title Insurance Company $44,000 on which $20,000 was paid out of escrow to the Defendant COCKE on or about January 10, 1969.

7. Plaintiffs have been ready at all times to close this transaction since December 15, 1968, the date set forth in the escrow instructions, or anytime thereafter.

8. Also, Defendant JOAN H. COCKE has been ready to perform since December 15, 1968, and thereafter, and has admitted her obligation to perform under the contract.

9. COCKE has refused to perform the agreement for the purchase and sale and convey the property to STEWART or to the HORNES.

10. As a result of COCKE's failure to perform the agreement for the purchase and sale and convey the property as provided by the contract, Plaintiffs incurred damages as follows:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

11. These damages were incurred by Plaintiffs because of Defendant COCKE's failure to perform the agreement for the purchase and sale, and convey the said land as provided by the contract, and are costs which were preliminary to the development of the property, and are no longer usable or otherwise recoverable by

Plaintiffs.

12. These preliminary costs incurred by Plaintiffs were within the contemplation of Defendant COCKE at the time the contract of October 9, 1968, was entered into.

13. On December 8, 1970, this Court granted the Plaintiffs' motion for summary judgment awarding Plaintiffs specific performance of the contract dated October 9, 1968, against Defendant COCKE.

[88] 14. However, since December 8, 1970, COCKE has refused and still refuses to perform the agreement for the purchase and sale and convey the property which he and JOAN H. COCKE agreed to sell to STEWART and which he had been ordered to convey by the Court.

And the Court further finds as conclusions of law the following:

1. The Plaintiffs are entitled to specific performance against the Defendant COCKE as ordered by the Court on December 8, 1970, granting the Plaintiff's motion for summary judgment.

2. The damages incurred by Plaintiffs in the sum of Forty-seven Thousand Four Dollars and Eighty-six Cents ($47,004.86), consisting of:

CONSULTING AND ARCHITECTUAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

were incurred as a result of Defendant FRANCIS M. COCKE's failure to convey to Plaintiffs, said damages being within the contemplation of Defendant FRANCIS M. COCKE at the time he entered into this transaction.

3. That Plaintiffs have and recover their costs of suit herein against the Defendant FRANCIS M. COCKE in the amount of One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51).

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED granting Plaintiffs' motion for summary judgment against Defendant FRANCIS M. COCKE, thereby requiring Defendant FRANCIS M. COCKE to specifically perform the contract entered into by the parties on October 9, 1968, all as prayed for in Plaintiffs' complaint, to convey the following described real estate, to-wit:

PARCEL NO. 1: That part of the East half of the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

[89] BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of

said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence North 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of Section 20 which bears South 89° 43' 55" West 528.00 feet from

the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481.97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23

feet along the North line of said Southeast quarter of Section 20 to the point of beginning.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to specific performance ordered by this Court, that Plaintiffs have and take judgment for damages plus interest as provided by law until paid, against the Defendant FRANCIS M. COCKE for the sum of Forty-Seven Thousand Four Dollars and Eighty-six Cents ($47,004.86), said amount being for:

[90] CONSULTING AND ARCHITECTURAL FEES

- $ 6,349.00

SALARIES AND OFFICE OVERHEAD

- $18,895.86

INTEREST ON MONEY IN PROJECT

- $21,760.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED granting Plaintiffs' costs of suit taxed at One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), plus interest as provided by law until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the expiration of the period for appeal herein as provided by Rule 73(b) of the Arizona Rules of Civil Procedure, Plaintiffs shall pay into the escrow account established with the Transamerica Title Insurance Company the sum of Sixty-four Thousand Dollars ($64,000) repre-

senting the second installment due from Plaintiffs on January 2, 1969, against which the Plaintiffs may set off against the Defendant FRANCIS M. COCKE's interest in the purchase money proceeds, the damages due them by said Defendant FRANCIS M. COCKE, as well as their costs of suit herein, viz: Forty-seven Thousand Four Dollars and Eighty-six Cents ($47,004.86) and One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), respectively, plus interest as provided by law until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there shall be paid over to the Plaintiffs the sum of Twenty-four Thousand Dollars ($24,000) to the extent of the interest of the Defendant FRANCIS M. COCKE therein, now on deposit in the escrow with the Transamerica Title Insurance Company less charges for said escrow applicable to the closing of the interest of the Defendant FRANCIS M. COCKE in subject property, such sum representing the Defendant FRANCIS M. COCKE's interest in such purchase money proceeds against which the Plaintiffs shall set off for the balance of any remaining damages due them by said Defendant FRANCIS M. COCKE, if any, as well as their costs of [91] suit herein, viz: Forty-seven Thousand Four Dollars and Eight-six Cents ($47,004.86) and One Thousand Four Hundred Sixty-three Dollars and Fifty-one Cents ($1,463.51), respectively, plus interest as provided by law until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall set off the balance of any damages due them by the Defendant FRANCIS M. COCKE, their costs of suit herein, plus interest as

provided by law until paid, against any further installment payments of the purchase price of said real estate to the extent of the Defendant FRANCIS M. COCKE's interest in said purchase money proceeds until the full amount of said damages and costs of suit are paid in full plus interest as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73(b) of the Arizona Rules of Civil Procedure.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said [92] contract as modified hereby.

DONE IN OPEN COURT this 27th day of September, 1972.

/s/ Irwin Cantor
Judge of the Superior Court

Copy of the foregoing Second Amended Judgment lodged with the Court this 26th day of July, 1972, and mailed on same date to:

Powell B. Gillenwater
Browder & Gillenwater
Attorneys for Transamerica Title
3003 N. Central, Suite 2304
Phoenix, AZ 85012

Loretta Whitney
Attorney for Joan H. Cocke
603 Luhrs Building
Phoenix, AZ 85003

George Sorenson, Jr.
Attorney for Dorothy H. Cocke
and Elizabeth C. Cocke
609 Luhrs Building
Phoenix, AZ 85003

L. Alton Riggs, Jr.
Attorney for F. M. Cocke
48 N. Macdonald Street
Mesa, AZ 85201

/s/ Herbert E. Kelly

[93] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al,	
Plaintiffs,	
vs.	
FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman,	No. C 222472
Defendants,	
vs.	(Filed: 9/7/73)
TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation,	
Additional Defendant on Counterclaim.	

APPLICATION FOR WRIT OF ASSISTANCE, OR, ALTERNATIVELY, FOR AN ORDER REQUIRING COMPLIANCE WITH JUDGMENT DATED SEPTEMBER 27, 1972, OR FOR A SUPPLEMENTAL BILL ENFORCING SAID JUDGMENT

JAMES STEWART COMPANY, an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife, pursuant to Rules 70 and 71 of the Arizona Rules of Civil Procedure, hereby make application for a writ of assistance, or, in the alternative, for an order requiring compliance with the judgment entered by this Court on September 27, 1972, or for a supplemental bill enforcing said judgment, and respectfully state unto the Court as follows:

1. On September 27, 1972, this

Court entered and filed its Second Amended Judgment in the above-captioned action, a copy of which is attached hereto as Exhibit "A" and incorporated herein by reference as though fully set forth.

2. Said action arose out of defendant Francis M. Cocke's refusal to specifically perform a contract entered into on October 9, 1968, between James Stewart Company as buyer and Francis M. Cocke and Joan H. Cocke as sellers, a copy of which is attached hereto as Exhibit "B" and incorporated herein by [94] reference as though fully set forth; and Escrow No. 02013111-7, a copy of which is attached hereto as Exhibit "C" and incorporated herein by reference as though fully set forth.

3. The judgment referred to in Paragraph 1 above (hereinafter referred to as "the judgment") provided, inter alia, as follows:

> "NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED granting Plaintiffs' motion for summary judgment against Defendant FRANCIS M. COCKE, thereby requiring Defendant FRANCIS M. COCKE to specifically perform the contract entered into by the parties on October 9, 1968, all as prayed for in Plaintiffs' complaint, to convey the following described real estate, to-wit:
>
> > "PARCEL NO. 1 That part of the East half of the Southeast quarter of Section Twenty (20), Township One (1) North, Range

Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the East line of said East half of the Southeast quarter of Section 20, where said East line intersects the middle of the George Ditch, which bears South 0° 20' 17" East 323.50 feet from the Northeast corner of said East half of the Southeast quarter of Section 20; thence South 0° 20' 17" East 1806.47 feet along the East line of said East half of the Southeast quarter of Section 20 to the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said East half of the Southeast quarter of Section 20; thence North 0° 07' 25" West 1381.50 feet along the West line of said East half of the Southeast quarter of Section 20 to the middle of the George Ditch; thence North 68° 31' 41" East 399.54 feet along the middle of the George Ditch; thence North 67° 40' 43" East 211.50 feet along the middle of the George Ditch; thence North 76° 59' 43" East 375.20 feet along the middle of the George Ditch; thence North 80° 57' 10" East 195.15 feet along the middle of the George Ditch; thence North 75° 14' 43" East 206.00 feet along the middle of the George Ditch to the point of beginning.

"PARCEL NO. 2: That part of the Southeast quarter of Section 20, Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

BEGINNING at a point on the North line of said Southeast quarter of Section 20 which bears South 89° 43' 55" West 528.00 feet from the Northeast corner of said Southeast quarter of Section 20; thence South 0° 20' 41" East 435.44 feet to the [95] middle of the George Ditch; thence South 76° 59' 43" West 236.29 feet along the middle of the George Ditch; thence South 67° 40' 43" West 211.50 feet along the middle of the George Ditch; thence South 68° 31' 41" West 399.54 feet along the middle of the George Ditch to a point on the West line of the East half of the Southeast quarter of said Section 20; thence South 0° 07' 25" East 1381.50 feet along the West line of the East half of the Southeast quarter of said Section 20 to a point on the North bank of the Jenkins Ditch; thence North 88° 40' 37" West 463.68 feet along the North bank of the Jenkins Ditch; thence North 89° 08' 43" West 481. 97 feet along the North bank of the Jenkins Ditch; thence North 0° 51' 17" East 9.00 feet; thence North 56° 56' 50" West 328.73 feet; thence North 34° 59' 16" West 150.00 feet; thence

> South 89° 54' 35" West 25.00 feet to a point on the West line of said Southeast quarter of Section 20; thence North 0° 05' 25" East 1757.73 feet along the West line of said Southeast quarter of Section 20 to the Northwest corner of said Southeast quarter of Section 20; thence North 89° 43' 55" East 2121.23 feet along the North line of said Southeast quarter of Section 20 to the point of beginning."

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that in addition to specific performance ordered by this Court, that Plaintiffs have and take judgment for damages plus interest as provided by law until paid, against the Defendant FRANCIS M. COCKE for the sum of Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86), said amount being for:

> "CONSULTING AND ARCHITECTURAL FEES - $ 6,349.00
>
> "SALARIES AND OFFICE OVERHEAD - $18,895.86
>
> "INTEREST ON MONEY IN PROJECT - $21,760.00

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED granting Plaintiffs' costs of suit taxed at One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), plus interest as provided by law until paid.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the expiration of the period for appeal herein as provided by Rule 73(b) of the Arizona Rules of Civil Procedure, Plaintiffs shall pay into the escrow account established with the Transamerica Title Insurance Company the sum of Sixty-Four Thousand Dollars ($64,000), representing the second installment due from Plaintiffs on January 2, 1969, against which the Plaintiffs may set off against the Defendant FRANCIS M. COCKE's interest in the purchase money proceeds, the damages due them by said Defendant FRANCIS M. COCKE, as well as their costs of suit herein, viz: Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86) and One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), respectively, plus interest as provided by law until paid; [96]

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there shall be paid over to the Plaintiffs the sum of Twenty-Four Thousand Dollars ($24,000) to the extent of the interest of the Defendant FRANCIS M. COCKE therein, now on deposit in the escrow with the Transamerica Title Insurance Company less charges for said escrow applicable to the closing of the interest of the Defendant FRANCIS M. COCKE in subject property, such sum representing the Defendant FRANCIS M. COCKE's interest in such purchase money proceeds against which the

Plaintiffs shall set off for the balance of any remaining damages due them by said Defendant FRANCIS M. COCKE, if any, as well as their costs of suit herein, viz: Forty-Seven Thousand Four Dollars and Eighty-Six Cents ($47,004.86) and One Thousand Four Hundred Sixty-Three Dollars and Fifty-One Cents ($1,463.51), respectively, plus interest as provided by law until paid;

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall set off the balance of any damages due them by the Defendant FRANCIS M. COCKE, their costs of suit herein, plus interest as provided by law until paid, against any further installment payments of the purchase price of said real estate to the extent of the Defendant FRANCIS M. COCKE's interest in said purchase money proceeds until the full amount of said damages and costs of suit are paid in full plus interest as provided by law.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annual installments due by the Plaintiffs under the said contract dated October 9, 1968, shall commence one year after the expiration of the period for appeal as provided by Rule 73 (b) of the Arizona Rules of Civil Procedure.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon compliance by Plaintiffs with the terms of said contract, Defendant FRANCIS M. COCKE

> shall perform all obligations necessary in accordance with the contract between the parties to convey the subject property;
>
> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that should Defendant FRANCIS M. COCKE not fully perform as ordered hereby, upon compliance with all necessary conditions by Plaintiffs, this judgment shall serve to divest the Defendant FRANCIS M. COCKE of his interest in and to the title to the subject property, said title to be vested in the Plaintiffs, all in accordance with Rule 70 of the Arizona Rules of Civil Procedure, subject to the Plaintiffs' compliance with the terms of said contract as modified hereby."

(Emphasis added.)

4. On October 10, 1972, defendant FRANCIS M. COCKE filed with this Court a motion to vacate the judgment, which motion was denied by the court on November 6, 1972, and the denial of such motion reaffirmed on November 8, 1972. [97]

5. On November 27, 1972, plaintiffs, in compliance with the judgment, contract and Escrow No. 02013111-7, paid over to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, the sum of $32,000 representing the balance of the second installment of $64,000 due from plaintiffs on January 2, 1969, after offsetting against the interest therein of FRANCIS M. COCKE the sum of $32,000 for the damages and costs awarded plaintiffs against defendant FRANCIS M. COCKE as set forth in the judgment.

6. On January 4, 1973, defendant FRANCIS M. COCKE filed a notice of appeal from the judgment entered on September 27, 1972, with the Clerk of the Court, and on January 8, 1973, plaintiffs filed their notice of cross appeal from the judgment.

7. On March 7, 1973, plaintiffs filed their motion to dismiss the appeal of defendant FRANCIS M. COCKE on the grounds that said appeal was untimely, and on May 17, 1973, the Court of Appeals of the State of Arizona dismissed the appeal of defendant FRANCIS M. COCKE on those grounds. Thereafter, on June 13, 1973, the Court of Appeals denied a motion for rehearing filed by defendant FRANCIS M. COCKE from the order of that Court of May 17, 1973, dismissing his appeal. On July 5, 1973, the Court of Appeals dismissed the cross appeal filed by plaintiffs on its own motion. Attached hereto and marked as Exhibits "D," "E" and "F," respectively, and incorporated herein as though fully set forth, are copies of the orders entered by Division One of the Court of Appeals for the State of Arizona on May 17, 1973, June 13, 1973, and July 5, 1973. Defendant FRANCIS M. COCKE did not thereafter file a petition for review with the Supreme Court of Arizona from the order of the Court of Appeals of June 13, 1973, within the time prescribed by Rule 47 (b) of the Rules of the Supreme Court of Arizona, nor did plaintiffs file a petition for review from the order of the Court of Appeals of July 5, 1973, within such time. [98]

8. After the expiration of the period of time for defendant FRANCIS M. COCKE to file a petition for review with the Supreme Court of Arizona, counsel for plaintiffs called Mr. L. Alton Riggs, Jr., counsel

for defendant FRANCIS M. COCKE, for the purpose of inquiring whether defendant FRANCIS M, COCKE would proceed to close Escrow No. 02013111-7 in compliance with the judgment, and plaintiffs' counsel was informed that defendant FRANCIS M. COCKE was farming in New Mexico and that his counsel did not know whether or not he intended to comply with the judgment. Thereafter, on July 17, 1973, July 31, 1973, and August 14, 1973, counsel for plaintiffs sent letters to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, requesting that said counterdefendant proceed with the closing of said escrow. Attached hereto and marked as Exhibits "G," "H" and "I," respectively, are copies of the aforementioned letters which are incorporated herein by reference as though fully set forth. On August 21, 1973, at a conference attended by counsel and the agent for counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, and counsel for plaintiffs, counsel for plaintiffs was informed that counterdefendant would not proceed to close Escrow No. 02013111-7 in compliance with the judgment. Also on said date, counsel for plaintiffs called Mr. L. Alton Riggs, Jr., counsel for defendant FRANCIS M. COCKE, and requested that counsel obtain the authorization of defendant FRANCIS M. COCKE for counterdefendant to proceed with the closing as required by the judgment, at which time counsel for defendant FRANCIS M. COCKE refused to call defendant FRANCIS M. COCKE for such purpose. Thereafter, on August 29, 1973, counsel for plaintiffs was informed by Mr. Powell B. Gillenwater, counsel for counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, that said counterdefendant would not proceed to close Escrow No. 02013111-7 without (1) authorization of defendant FRANCIS M. COCKE to do so [99] or (2) an order of this Court

requiring said counterdefendant to proceed to close said escrow in compliance with the judgment entered September 27, 1972.

9. On August 29, 1973, counsel for plaintiffs sent to defendant FRANCIS M. COCKE at his last known address, 1320 South Priest Road, Tempe, Arizona 85281, and in care of his attorney, Alton Riggs, at 1540 East University, Suite 200, Mesa, Arizona 85201, and to said Alton Riggs individually, a demand for compliance with the Second Amended Judgment entered and filed by the Superior Court of the County of Maricopa on September 27, 1972, a copy of which is attached hereto and marked as Exhibit "J" and incorporated herein by reference as though fully set forth. Said demand was sent by counsel for plaintiffs by certified mail, return receipt requested, postage prepaid. Also on August 29, 1973, counsel for plaintiffs sent to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, P. O. Drawer 13028, Phoenix, Arizona 85002, a demand for compliance with the Second Amended Judgment entered and filed by the Superior Court of the County of Maricopa on September 27, 1972, a copy of which is attached hereto and marked as Exhibit "K" and incorporated herein by reference as though fully set forth. Said demand was sent by counsel for plaintiffs by certified mail, return receipt requested, postage prepaid.

10. There is presently pending in the Court of Appeals of the State of Arizona, Division One, an appeal by defendant FRANCIS M. COCKE against counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, under Docket No. 1 CA-CIV 2306, in which appeal defendant FRANCIS M. COCKE is appealing a judgment entered by this Court on

November 6, 1972, in which appeal the defendant, FRANCIS M. COCKE, continues to question the propriety in which Escrow No. 02013111-7 was handled by counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, and said appeal [100] has not as of the date of filing of this application been concluded.

11. Inasmuch as the appeal by defendant FRANCIS M. COCKE from the judgment entered against him on September 27, 1972, in favor of plaintiffs has now been concluded and by reason of the refusal of defendant FRANCIS M. COCKE to comply with said judgment, and, further, by reason of the refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed to close Escrow No. 02013111-7, plaintiffs are now being placed in the position of being unable to further comply with the terms of said judgment and, indeed, are being deprived of the property rights awarded to them under the judgment dated September 27, 1972.

12. In the opinion of plaintiffs, it is necessary and proper that a writ of assistance requiring counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to comply with the judgment of September 27, 1972, or an order or such other supplemental bill or writ, be issued to counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, or such other proper officer, directing that Escrow No. 02013111-7 be closed in accordance with (1) the judgment entered by this Court on September 27, 1972, (2) the contract entered into on October 9, 1968, by and between James Stewart Company and defendants, Francis M. Cocke and Joan H. Cocke, and (3) the escrow instructions entered into by plaintiffs and defendants with counterdefendant on October 9, 1968.

Such writ of assistance, order or supplemental bill, or such other writ as deemed necessary and proper in the premises, should comply with the terms of the aforesaid contract and escrow instructions, except as modified by the judgment of the Court entered on September 27, 1972, and should provide plaintiffs with such relief as is necessary to effectuate the closing of the escrow in accordance with the terms of the aforesaid contract and [101] escrow instructions as modified by the judgment, including but not limited to the appointment of such person or officer of the Court to do any and all things necessary for compliance with the terms of the aforesaid contract and escrow instructions, specifically including the agreements between plaintiffs and defendants as set forth in Paragraphs 1 and 3 of the contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of Escrow No. 02013111-7. In the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided for by said escrow instructions, as set forth in the last paragraph of Schedule "A" attached and made a part of Escrow No. 02013111-7, then such writ, order or other supplemental bill or writ should provide for the appointment of some other depository to act for such purpose, or provide for the note and mortgage to be held by the Clerk of the Court and payments thereon to be received by the Clerk for distribution to defendants according to their respective interests.

13. In the event of the inability or refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed with the closing of Escrow No. 02013111-7, the

writ of assistance herein requested, or such other order, supplemental bill or writ as the Court deems necessary and proper in the premises, should provide for the appointment of a substitute escrow agent to act in the place and stead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, said substitute escrow agent to act in accordance with the aforesaid contract and escrow instructions as modified by the judgment and to be substituted with the rights, privileges and duties of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, The TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, has indicated to plaintiffs its willingness to be appointed as such substitute [102] escrow agent to act for and instead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, pursuant to order of Court, said TITLE INSURANCE COMPANY OF MINNESOTA to be substituted with the rights, duties and privileges of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, as set forth in the contract dated October 9, 1968, and Escrow No. 02013111-7 dated October 9, 1968, as modified by the judgment dated September 27, 1972, and such instructions as are issued by the Court in such writ, order or supplemental bill or writ as may be issued by the Court.

WHEREFORE, plaintiffs pray as follows:

1. That a writ of assistance, or an order, or such other supplemental bill or writ, be issued out of this Court ordering counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to comply with the judgment of this Court entered on September 27, 1972, and directing that Escrow No. 02013111-7 be closed in accordance with (1) the judgment entered by this Court on September 27, 1972, (2) the contract entered into on October 9,

1968, by and between James Stewart Company and defendants, Francis M. Cocke and Joan H. Cocke, and (3) the escrow instructions entered into by plaintiffs and defendants with counterdefendant on October 9, 1968.

2. That such writ of assistance, or order, or such other supplemental bill or writ as deemed necessary and proper by the Court in the premises, should direct compliance with the terms of the contract and escrow instructions dated October 9, 1968, except as modified by the judgment of the Court entered on September 27, 1972, and provide plaintiffs with such relief as is necessary to effectuate the closing of Escrow No. 02013111-7 in accordance with the terms of the aforesaid contract and escrow instructions as modified by the judgment of September 27, 1972, including but not limited to the appointment of such person or persons, officer or officers of the Court to do any and all things [103] necessary for compliance with the terms of the aforesaid contract and escrow instructions No. 02013111-7, specifically providing that the agreements between plaintiffs and defendants as set forth in Paragraphs 1 and 3 of the contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of escrow instructions No. 02013111-7 be performed.

3. In the alternative, in the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided by said escrow instructions, that the Court appoint some other depository to act for such purpose, or direct that the note and mortgage be held by the Clerk of the Court and payments thereon be made to the Clerk

for distribution to defendants according to their respective interests.

4. In the alternative, in the event of the inability or refusal of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, to proceed with the closing of Escrow No. 02013111-7 as directed by such writ of assistance, order or such other supplemental bill or writ as shall issue from this Court, that the Court appoint as an officer of this Court a substitute escrow agent to act in the place and stead of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY, said substitute escrow agent to act in accordance with the aforesaid contract and escrow instructions No. 02013111-7, as modified by the judgment entered September 27, 1972, and to be substituted with all rights, privileges and duties of counterdefendant, TRANSAMERICA TITLE INSURANCE COMPANY.

5. For such other and further relief as the Court deems necessary and proper in the premises.

Respectfully submitted, [104]

KELLY AND CORBIN

By /s/ Hubert E. Kelly
Hubert E. Kelly
Attorney for Plaintiffs

[105] SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

JAMES STEWART COMPANY, An Arizona Corporation; et al,

Plaintiffs,

vs.

FRANCIS M. COCKE, a divorced man, and JOAN H. COCKE, a divorced woman,

Defendants,

vs.

TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, An Arizona Corporation,

Additional Defendant On Counterclaim.

No. C 222472

Filed: 10/31/73

ORDER GRANTING APPLICATION FOR WRIT OF ASSISTANCE, OR, ALTERNATIVELY, REQUIRING COMPLIANCE WITH JUDGMENT DATED SEPTEMBER 27, 1972, OR FOR A SUPPLEMENTAL BILL ENFORCING SAID JUDGMENT

The verified Application for Writ of Assistance, or, Alternatively, for an Order Requiring Compliance with Judgment Dated September 27, 1972, or for a Supplemental Bill Enforcing said Judgment coming on regularly to be heard pursuant to the Order to Show Cause issued by this Court on September 7, 1973, notice of said hearing and the continued hearing having been duly given to each of the defendants herein, and the same having been heard in open court on October 12, 1973, with the plaintiffs, JAMES STEWART CO., an Arizona corporation, and M. SETH

HORNE and MAURINE D. HORNE, his wife, being represented by their attorney, HUBERT E. KELLY; the defendant JOAN H. COCKE, a divorced woman, being represented by her attorney, LORETTA S. WHITNEY; the defendant TRANSAMERICA TITLE COMPANY, successor by change of name to TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, being represented by its attorney, POWELL B. GILLENWATER; and the defendant FRANCIS M. COCKE, a divorced man, neither appearing in person nor by counsel; and the Court having taken the same under advisement on October 12, 1973; and it appearing [106] to the Court that the allegations set forth in the said verified application are true and correct and that this Court has jurisdiction to grant the relief sought in the said verified application; and

IT FURTHER APPEARING upon representation by counsel for the defendant TRANSAMERICA TITLE CO. that said defendant is no longer willing to act as escrow agent of Escrow No. 02013111-7 and close said escrow in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the Second Amended Judgment entered and filed by this Court on September 27, 1972, or in any manner act in connection with the said escrow or the closing thereof; and

IT FURTHER APPEARING to the Court that the TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, has indicated its willingness to be appointed pursuant to order of this Court to act for and in the place and stead of the defendant TRANSAMERICA TITLE CO. for the purpose

of closing said Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the Second Amended Judgment entered and filed by this Court on September 27, 1972, and such instructions as are issued by the Court pursuant to this proceeding; and

IT FURTHER APPEARING, after considering the said verified application, the exhibits filed and the oral arguments of counsel at the hearing in open court, that the relief sought in the said verified application should be granted;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs, JAMES STEWART CO., an Arizona corporation, and M. SETH HORNE and MAURINE D. HORNE, his wife, are entitled to have Escrow No. 02013111-7 closed in accordanc with the [107] contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, and that a writ of assistance, order requiring compliance with the judgment dated September 27, 1972, or supplemental bill enforcing said judgment be, and it is hereby, issued by this Court and directed to the TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, appointing and commanding said Title Insurance Company of Minnesota to act in the place and stead of the defendant TRANSAMERICA TITLE CO. as the escrow agent for the purpose of proceeding with and closing Escrow No. 0201311l-7, or such other number

which said escrow may hereafter be assigned by Title Insurance Company of Minnesota, in accordance with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, be, and it is hereby, substituted as escrow agent with all of the rights, privileges and duties of the defendant TRANSAMERICA TITLE CO. for the purpose of proceeding with and closing Escrow No. 02013111-7, all as set forth in the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, be, and it is hereby, appointed as an officer of this Court to do any and all acts deemed necessary and proper to effectuate the closing [108] of Escrow No. 02013111-7 in accordance with the terms of the aforsaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, including but not limited to any and all acts and things necessary for compliance with the terms of the aforesaid contract and escrow instructions No. 02013111-7, and specifically those provisions set

forth in Paragraphs 1 and 3 of the aforesaid contract dated October 9, 1968, and each and every provision set forth in Schedule "A" attached and made a part of escrow instructions No. 02013111-7; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, as the officer of this Court pursuant to Rule 70 of the Arizona Rules of Civil Procedure, be, and it is hereby, authorized to execute all documents for and on behalf of and in the name of FRANCIS M. COCKE for the purpose of effectuating the closing of Escrow No. 02013111-7, including but not limited to the execution of a warranty deed or deeds to convey the property set forth in the judgment entered and filed by this Court on September 27, 1972, and such other documentation as is necessary to effectuate the closing of Escrow No. 02013111-7 and the transfer of legal title thereto to plaintiffs, or any of them, subject to compliance by the plaintiffs with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment entered and filed by this Court on September 27, 1972, and this order; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in the event the Tempe Branch of The First National Bank of Arizona shall refuse to hold for collection the note and mortgage provided by [109] said escrow instructions dated October 9, 1968, then said TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, as the appointed officer of this Court pursuant to Rule 70

of the Arizona Rules of Civil Procedure to effectuate the closing of Escrow No. 02013111-7, be, and it is hereby, appointed to hold said note and mortgage and to collect and deposit the proceeds thereof, as the same may be paid to it under the terms thereof, in such savings accounts or time certificates of deposit in any national banking association or federal savings and loan association in Phoenix, Arizona, as it deems best and desirable; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the writ of assistance, order requiring compliance with the judgment dated September 27, 1972, or supplemental bill enforcing said judgment issued pursuant to this order be also directed to the Sheriff, County of Maricopa, State of Arizona, commanding such officer, upon compliance with the aforesaid contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers; as modified by the judgment entered and filed by this Court on September 27, 1972, and this order, to remove the defendant FRANCIS M. COCKE from such portion or portions of said property as described in the judgment entered and filed by this Court on September 27, 1972, as is necessary, upon the aforesaid compliance by the plaintiffs herein, and to deliver possession of said portion or portions of said property to the plaintiffs; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant TRANSAMERICA TITLE CO. be, and it is hereby, directed to deliver, transfer and set over all documents, moneys, deposits, deeds, forms of deed and such other instruments as are

contained in Escrow No. 02013111-7 to TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, for the purposes of effectuating this [110] order and the writ issued pursuant hereto; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to the law of this case, the defendant TRANSAMERICA TITLE CO. is authorized to pay to itself from all sums on hand in Escrow No. 02013111-7, to the extent of the interest of Francis M. Cocke therein, all unreimbursed attorney's fees, costs, escrow fees, trust fees, transfer fees and any and all other expenses incurred in connection with said escrow and the transfer of said escrow to said Title Insurance Company of Minnesota, pursuant to this order.

DONE IN OPEN COURT this 31st day of October 1973.

/s/ Irwin Cantor
JUDGE

APPROVED:

TRANSAMERICA TITLE CO.
By
/s/ Frances Bumsted
FRANCES BUMSTED

[111]

IN THE SUPERIOR COURT OF THE STATE OF ARIZ.
IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE and MAURINE D. HORNE, his wife, Plaintiffs, v. FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants, v. TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona corporation, Additional Defendant on Counterclaim.	No. C-222472 Filed: 10/31/73

WRIT OF ASSISTANCE OR, ALTERNATIVELY, ORDER, REQUIRING COMPLIANCE WITH JUDGMENT DATED SEPTEMBER 27, 1972, OR SUPPLEMENTAL BILL ENFORCING SAID JUDGMENT

To: TITLE INSURANCE COMPANY OF MINNESOTA,
a Minnesota corporation
3003 North Central Avenue
Phoenix, Arizona; and

SHERIFF, COUNTY OF MARICOPA, STATE OF ARIZONA

GREETING:

WHEREAS, by judgment of this Court entered and filed on September 27, 1972, a certified copy of which is attached hereto as Exhibit "A", it was, among other things, adjudged and decreed that the above-captioned plaintiffs were entitled to specific performance by the defendant FRANCIS M. COCKE of a certain contract and escrow instructions entered into on October 9, 1968, between the plaintiff JAMES STEWART CO. as buyer and FRANCIS M. COCKE and JOAN H. COCKE as sellers, and such other and further relief as set forth in said judgment dated September 27, 1972; and

WHEREAS, by order of this Court on October 31, 1973, a certified copy of which is attached hereto as Exhibit "B," it was ordered that a writ of assistance, order requiring compliance with judgment dated September 27, 1972, or supplemental bill [112] enforcing said judgment be issued to TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, to effectuate the closing of Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973; and tothe SHERIFF OF THE COUNTY OF MARICOPA, STATE OF ARIZONA, to put said plaintiffs in possession of the land and premises as described in the judgment entered and filed by this Court on September 27, 1972, and to maintain and defend their possession upon their compliance with the terms of the aforesaid contract and escrow instruc-

tions entered into on October 9, 1968, as modified by the judgment dated Sepetmber 27, 1972, and the order dated October 31, 1973;

NOW, THEREFORE, TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, is commanded that, immediately after receiving this writ, it obtain from TRANSAMERICA TITLE CO. possession of the files relating to Escrow No. 02013111-7, including all documents, deeds, deposits and instruments constituting a part of said escrow files, and proceed with the closing of Escrow No. 02013111-7 in accordance with the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973, without delay; and the SHERIFF OF THE COUNTY OF MARICOPA, STATE OF ARIZONA, is commanded that, upon compliance by the plaintiffs with the terms of the contract and escrow instructions entered into on October 9, 1968, between James Stewart Co. as buyer and Francis M. Cocke and Joan H. Cocke as sellers, as modified by the judgment dated September 27, 1972, and the order dated October 31, 1973, [113] to go to and enter upon such portion or portions of the land and premises as described in the judgment entered and filed by this Court on September 27, 1972, and eject and remove therefrom all and every person or persons holding or detaining the same, or any part thereof, against the said purchaser (the plaintiffs), and that the said Sheriff deliver to said purchaser or their assigns the possession of the land and premises without delay and maintain, keep and defend their possession according to the

tenor and true intent of the judgment dated September 27, 1972, and order of this Court dated October 31, 1973.

WITNESS, the HONORABLE IRWIN CANTOR, Judge of the Superior Court, State of Arizona, in and for the County of Maricopa, and the seal of said Superior Court, this 31st day of October, 1973.

/s/ Irwin Cantor
JUDGE

Attested by:
Wilson D. Palmer

By:
Carlyn R. Brennan
Deputy Clerk

[645]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANCIS M. COCKE,
Plaintiff,
vs.
IRWIN S. CANTOR, EINO M. JACOBSEN, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON,
Defendants.

No. Civ. 74-20
Phx. WPC

Filed: 3/4/74

MEMORANDUM AND ORDER

This is an action under the Civil Rights Act, 42 U.S.C. §§ 1981 *et seq.*(1970). Jurisdiction is predicated on 28 U.S.C. § 1343 (3,4) (1970). Various defendants and groups of defendants have filed motions to dismiss or for summary judgment.

The action arises out of a real estate transaction and subsequent state-court litigation. The defendants are practically every party, attorney and judge who had anything to do with the case. The following is a summary of the [646] complex proceedings and the claims of the prolix complaint.

Plaintiff and defendant Joan Cocke made a property settlement agreement in 1964, pursuant to which a trust was established with First National Bank. They were divorced in 1967. Certain property in this district held by them and the trustee in varying interests was agreed to be sold in 1968 to James Stewart Company (or its nominee the defendants Horne), and is identified in the record as Parcels 1 and 2. Apparently the sale was to except a certain easement known as the Jenkins Ditch, designated parcels 1A and 2A. Defendant Transamerica Title was the escrow agent. After a series of events, including a dispute between the Cockes over payment instructions and refusal of plaintiff to execute certain documents, the buyers brought suit for specific performance of the sale agreement. James Stewart Co. v. Cocke, Civil No. C-222472 (Maricopa Cty., Arizona Super. Ct., filed Apr. 22, 1969).

In the meantime, the underlying payment dispute between the Cockes was litigated in post-divorce proceedings. Cocke v. Cocke, Civil No. D-89,833 (Maricopa Cty. Ariz. Super. Ct. Dec. 31, 1968 & Mar. 15, 1969), aff'd, 13 Ariz. App. 57, 474 P. 2d 64 (1970). The court there held Mr. Cocke estopped to assert the irrevocability of the trust, and found that the sale property had been placed outside the trust.

In a series of judgments, the trial court dismissed Cocke's counter- and crossclaims against his wife and other parties in the specific performance action. James Stewart Co. v. Cocke, supra (Nov. 10, 1970), aff'd sub nom. Cocke v. Transamerica Title Ins. Co., 16 Ariz. App. 556, 494 P. 2d 756 (1972). Finally it entered judg-

ment against Cocke on the [647] complaint and ordered the sale consummated. James Stewart Co. v. Cocke, supra (Sep. 27, 1972), appeal dismissed, No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). A more detailed but concise statement of the procedural facts and substantive issues appears in the two reported court of appeals decisions. While he proceeds here pro se, plaintiff was represented by counsel in the state litigation.

First, there is no question of this court's subject-matter jurisdiction. The complaint purports to state a claim for denial of due process and equal protection rights by individuals and by conspiracy. The judges are sued in their individual, not official, capacities, and the claim is therefore against "persons" within the meaning of the Act.

Second, exhaustion of remedies is not required in these cases, assuming arguendo that there are facts in the record to support that defense. McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433 (1963).

Third, there is no indication that the court lacks jurisdiction over the person of any of the defendants. All the attacks on the jurisdiction of this court are therefore without merit.

If properly obtained in courts of competent jurisdiction, the state judgments underlying the claims in the present complaint are res judicata of the things there decided. That has nothing to do with the constitutional issues raised here, however, which were not litigated in state court. Indeed, this

court would not have jurisdiction of the underlying dispute by itself, for lack of diversity or federal question. The gravamen of the complaint is that the state judicial system was perverted by the defendants to result in the [648] judgments against plaintiff, in contravention of.the fourteenth amendment. A finding of res judicata or collateral estoppel, in the context of this case, would bar redress on the very facts alleged to be the proximate cause of the constitutional harm.

Plaintiff's first attack is on the jurisdiction of the state courts to decide the real estate dispute. His premise for this contention is that the courts proceeded to judgment in the absence of "indispensable parties." It is well settled that the considerations in rule 19(b) are equitable, not jurisdictional. "To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S.Ct. 733 (1968) (Footnote omitted); see Jacobs v. United States, 367 F. Supp. 1275, 1281-84 (D. Ariz. 1973).

Once this linchpin falls, plaintiff's complaint states no more that the history of a complex, sometimes confused litigation. Without reciting detail, but nevertheless reading the complaint with every intendment in its favor, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594 (1972), it fails to demonstrate that the defendants used

the courts unequally against him, or that the process was a sham, or that any significant right was denied him without legal justification. It is not made clear how any one individual acted alone or in conspiracy to accomplish such a result. It wholly fails to show any conspiracy. The complaint does not state a claim [649] under the Civil Rights Act. Scott v. California Supreme Court, 426 F. 2d 300 (9th Cir. 1970); Fed. R. Civ. P. 12 (b) (6).

It is unnecessary to reach the issue whether plaintiff must demonstrate membership in a class under one or more sections of the statute.

IT IS ORDERED:

1. The motions to dismiss for lack of subject matter jurisdiction by defendants Cantor, Jacobson and Donofrio, defendants Tanner, Kelly, Schneider, Title Ins. Co. of Minn,. James Stewart Co., Horne et ux. and Burton, and defendant Joan Cocke are denied. Fed. R. Civ. P. 12(b) (1).

2. The motions for summary judgment on the ground of res judicata by all defendants except Cantor, Jacobson, and Donofrio are denied.

3. The motion of defendants Cantor, Jacobson and Donofrio to dismiss on the ground of judicial immunity is granted.

4. The motions of all defendants to dismiss pursuant to Fed. R. Civ. P. 8, 12(b) (6) are granted.

5. The complaint and action are dis-

missed with prejudice.

DATED March 4, 1974.

/s/ Wm. P. Copple
United States District
Judge

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UNITED STATES DISTRICT COURT

for the

District of Arizona

CIVIL ACTION FILE NO. 74-20 Phx. WPC

FRANCIS M. COCKE,)
)
Plaintiff,)
vs.)
) JUDGMENT
IRWIN S. CANTOR, et al;)
)
Defendants.)
)

This action came on for ~~trial (hearing)~~ consideration before the Court, Honorable Wm. P. Copple, United States District Judge, presiding, and the issues having duly ~~tried (heard)~~ considered and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing and that action is dismissed with prejudice.

FILED
March 4, 1974
By /s/ P. T. Martin
Deputy Clerk

Dated at Phoenix, Arizona, this 4th day of March, 1974.

W. J. FURSTENAU, Clerk
By /s/ P. T. Martin
Deputy Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRANCIS M. COCKE,

Plaintiff-Appellant

v.

IRWIN S. CANTOR, et al.

Defendant-Appellees

No. 74-1997

ORDER

Filed: 10/7/74

Before: MERRILL, HUFSTEDLER, and WALLACE, Circuit Judges. In the light of the entire record, the district court correctly determined that the complaint failed to assert a claim upon which relief could be granted.

The judgment of dismissal is affirmed.

KELLY AND CORBIN
550 West Washington
Phoenix, ARizona 85003

Attorneys for Plaintiffs,

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

JAMES STEWART CO., an Arizona corporation; M. SETH HORNE; and MAURINE D. HORNE his wife, Plaintiffs,	NO. C-222472
vs.	
FRANCIS M. COCKE, a divorced man; and JOAN H. COCKE, a divorced woman, Defendants.	Filed: September 30, 1974
vs.	
TRANSAMERICA TITLE INSURANCE COMPANY OF ARIZONA, an Arizona Corporation, Additional Defendant on Counterclaim.	

ORDER APPROVING ACCOUNT OF COURT-APPOINTED OFFICER AND PETITION FOR APPROVAL AND APPLICATION FOR INSTRUCTIONS AND FOR DISTRIBUTION

(Assigned to Judge Cantor - Division 7)

TITLE INSURANCE COMPANY OF MINNESOTA, a Minnesota corporation, having filed its verified Account of Court-Appointed Officer; Petition for Approval and Application for Instructions and for Distribution; and pursuant thereto, the Court having issued its Order to show cause why the relief prayed for in the account and petition should not be granted and appointing the 28th day of August, 1974, at the hour of 4:00 o'clock P.M. as the place and time for hearing upon said petition;

And, on said day and time the said account and petition coming on regularly to be heard by the Court, the Petitioner TITLE INSURANCE COMPANY OF MINNESOTA and Plaintiffs appearing by their attorney, Hubert E. Kelly, the Defendant, FRANCIS M. COCKE, appearing by and through his attorney, L. Alton Riggs, Jr., and Defendant, JOAN H. COCKE, appearing by and through her attorney, Loretta Whitney, and no other party appearing in person or by their attorney, and the Court having heard the testimony and having examined the proofs offered in evidence finds that the allegations set forth in the Verified Account and Petition are true and correct and that the Court has jurisdiction to grant the relief sought in the said Verified Account and Petition;

And, the Defendant, JOAN H. COCKE, by and through her attorney, Loretta Whitney, having represented to the Court her approval of the Verified Petition and Account and for the relief therein sought;

And it appearing to the Court that TITLE INSURANCE COMPANY OF MINNESOTA, pursuant to the Writ of Assistance issued out of this Court on October 31, 1973, did proceed with the closing of the escrow theretofore known as No. 0201311-7 in accordance with the contract and escrow

instructions entered into on October 9, 1968 between JAMES STEWART CO., as buyers, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, as modified by the Judgment dated September 27, 1972, and the Order granting the Writ of Assistance on October 31, 1973; that in connection with the closing of said escrow pursuant to the Contract and Escrow Instructions entered into on October 9, 1968 between JAMES STEWART CO., as buyers, and FRANCIS M. COCKE and JOAN H. COCKE, as sellers, Plaintiffs have done all things thereunto required of them and did comply with the terms of said Contract and Escrow Instructions, as modified by the Judgment entered and filed by this Court on September 27, 1972 and the Order of October 31,1973 granting the Writ of Assistance; that in connection with the closing of said escrow, Title Insurance Company of Minnesota did all things thereunto commanded of it by this Court under the Writ of Assistance issued by this Court pursuant to the Order of October 31, 1973 and did close said escrow on December 20, 1973 in accordance with terms and conditions of the aforesaid Contract and Escrow Instructions, as modified, and did, on December 21, 1973, in connection therewith grant the easements provided for in said Contract and Escrow Instructions, copy of which are attached hereto as Exhibits "A" and "B", respectively, and incorporated herein by reference, and did convey to Plaintiffs according to their respective interests, pursuant to the Writ of Assistance and by Special Warranty Deed, a copy of which is attached hereto as Exhibit "C", the interest of the Defendant, FRANCIS M. COCKE, in and to the real property situate in Maricopa County and described therein; and that in connection with the closing of

said escrow the said TITLE INSURANCE COMPANY OF MINNESOTA, did further receive and account for the charges against and credits to the Plaintiffs as buyers, and the charges against and credits to the said FRANCIS M. COCKE and JOAN M. COCKE, as sellers, according to their respective interests and in accordance with the aforesaid Contract and Escrow Instructions entered into on October 9, 1968, as modified by the Judgment entered and filed herein on September 27, 1972 and the Order of October 31, 1973;

It further appearing to the Court that the aforesaid Contract and Escrow Instructions provided the Plaintiffs the right and privilege to prepay the purchase money mortgage given by them in connection with the closing of said escrow for and on behalf of the Defendants, FRANCIS M. COCKE and JOAN A. COCKE, at any time after January 2, 1969; that on July 1, 1974, Plaintiffs did prepay the full amount of the unpaid balance of the purchase money mortgage then due and owing, viz.: $420,238.15, plus interest in addition thereto of $13,253.51, against the interestof FRANCIS M. COCKE, the said TITLE INSURANCE COMPANY OF MINNESOTA offset $8,240.80, the shortage in closing fees and charges of the Defendant, FRANCIS M. COCKE on December 20, 1973; that as a result of said prepayment by Plaintiffs the said TITLE INSURANCE COMPANY OF MINNESOTA paid in full a mortgage due the Federal Land Bank Association in the sum of $34,802.88, on the real estate the subject of said Contract and Escrow Instructions entered into on October 9, 1968, for the purpose of clearing title for the subject property to Plaintiffs; that pursuant to the Contract and Escrow Instructions, as modified, there remains due and owing

to Arleigh H. Burton, as a result of the prepayment by Plaintiffs and for real estate commissions due pursuant to the aforesaid Contract and Escrow Instructions the sum of $17,411.91, plus interest, to July 1, 1974 of $560.06, which said TITLE INSURANCE COMPANY OF MINNESOTA applied against the interest of FRANCIS M. COCKE, the sum of $14,320.07, and against the interest of JOAN H. COCKE the sum $3,651.90, and that there now remains in the hands of the said TITLE INSURANCE COMPANY OF MINNESOTA for and on behalf of the Defendants, FRANCIS M. COCKE the sum $278,216.02 and JOAN H. COCKE, the sum $94,259.79, all pursuant to the aforesaid Contract and Escrow Instructions entered into on October 9, 1968 as modified by the Judgement entered and filed on September 27, 1972 and the Order dated October 31, 1973;

And the Defendant, FRANCIS M. COCKE, having filed in Open Court F. M. Cocke's Response to Order to Show Cause and Motion to Vacate or Set Aside Order Granting Writ of Assestance and the Writ Itself, and the Court having considered the same and all other matters and things in the premises;

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED denying Defendant's FRANCIS M. COCKE'S Motion to Vacate or Set Aside Order Granting Writ of Assistance and the Writ Itself, and the Court reaffirms the Order entered on October 31, 1973 granting a Writ of Assistance, Order Requiring Compliance With Judgment Dated September 27, 1972, Or Supplemental Bill Enforcing Said Judgment And The Issuance of the Writ of Assistance on October 31, 1973; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the closing of Escrow No.

0201311-7 on December 20, 1973 by the TITLE INSURANCE COMPANY OF MINNESOTA pursuant to the Contract and Escrow Instructions entered into on October 9, 1968, as modified by the Judgement entered and filed herein on September 27, 1972 and by Order of this Court on October 31, 1973, and pursuant to the Writ of Assistance issued by this Court on October 31, 1973 is approved and confirmed and that the account of the said TITLE INSURANCE COMPANY OF MINNESOTA as set forth in the Verified Petition and Account be, and it is hereby, settled and approved including, but not limited to the following:

a) The receipt of purchase money proceeds and mortgages and the application of charges and credits for and against the Plaintiffs, as buyers, and the Defendants, FRANCIS M. COCKE and JOAN H. COCKE, as sellers, according to their respective interests, in connection with the closing of the aforesaid escrow, including the disbursement of proceeds of sale in the sum of $21,210.84 to JOAN H. COCKE, on or about December 20, 1973;

b) The easements granted by the said TITLE INSURANCE COMPANY OF MINNESOTA in connection with the closing of said escrow as provided for in the Contract and Escrow Instructions entered into on October 9, 1968, copies of which are attached hereto as Exhibits "A" and "B", respectively, and incorporated herein by this reference;

c) The Special Warranty Deed executed by said Title Insurance Company of Minnesota, pursuant to the Writ of Assistance, a copy of which is attached hereto as Exhibit "C".

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving and settling the accept-

ance of the prepayment by Plaintiffs JAMES STEWART CO. and M. SETH HORNE and MAURINE D. HORNE of the full amount of the purchase money mortgage then due and owing on July 1, 1974 to Defendants, FRANCIS M. COCKE and JOAN H. COCKE, according to their respective interests, viz.: $420,238.15, plus interest of $13,253.51, and the issuance by Petitioner of satisfaction of mortgages by reason of said prepayment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving the deposit proceeds available for distribution and in the hands of Petitioner in certificates of deposits and savings accounts pending distribution of same;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that distribution be made by Petitioner of $278,216.02 to the Defendant, FRANCIS M. COCKE, and of $94,259.79 to the Defendant JOAN H. COCKE, as and for their respective remaining distributable share of the purchase money proceeds out of the Contract and Escrow Instructions dated October 9, 1968, as modified by the Judgment of this Court entered and filed on September 27, 1972 and the Order dated October 31, 1973;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED approving all other acts and things done by Petitioner, TITLE INSURANCE COMPANY OF MINNESOTA on behalf of FRANCIS M. COCKE and JOAN H. COCKE in connection with the Contract and Escrow Instructions dated October 8, 1968, as modified by the Judgement of this Court entered and filed on September 27, 1972 and the Order dated October 31, 1973 and the prepayment of the purchase money mortgages received from Plaintiffs in connection therewith on September 20, 1973.

DONE IN OPEN COURT THIS 30th day of

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1

September, 1974.

/s/ Irwin Cantor
Judge of the Superior Court

The Original of the foregoing lodged with the Court this 13 day of September, 1974.

Copies mailed this 13 day of September, 1974, to:

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/s/ Hubert E. Kelly
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JUL 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION AND JUDGMENTS BELOW

Defendant agrees with the petitioner's summary of the opinion and judgments below.

JURISDICTION

Defendant agrees with the petitioner's assertion of jurisdiction in this court.

QUESTIONS PRESENTED

1. Does the mere allegation of a violation of the Civil Rights Act afford a federal court review of state court judgments rendered with jurisdiction over the parties, property and subject matter?

2. Does res judicata preclude the parties from relitigating in federal court issues that already have been litigated between the same parties in state court?

3. Do unsupported conclusionary allegations of conspiracy state a claim under the Civil Rights Act?

ARGUMENT NO. 1

The mere conclusionary allegation of a violation of the Civil Rights Act does not afford federal review of state court judgments rendered with valid jurisdiction. It is at once apparent from reading the Complaint that the gravamen of plaintiff's Complaint is simply that three state court judgments entered against him denied him his civil rights for the reason that the respective courts did not have jurisdiction to

enter the judgments. The Answer and Counterclaim clearly shows that Francis M. Cocke himself invoked the jurisdiction of the Superior Court of Arizona in June of 1969. No citations are needed to advise this Court that the filing of a general Answer and Counterclaim by Francis M. Cocke clearly gave the Superior Court of Arizona jurisdiction of the person of Francis M. Cocke. Likewise, the legal description of the real property attached to the Complaint shows that the property involved in the state court litigation is located in Maricopa County, Arizona. The Superior Court of the State of Arizona clearly had jurisdiction over the real property located in Maricopa County. Jurisdiction over the subject matter, to-wit: the real estate escrow, is likewise apparent.

It is respectfully submitted that the state court, having jurisdiction over the person, property and subject matter of the action, had jurisdiction to enter the three judgments which plaintiff now seeks to relitigate under the Civil Rights Act. Plaintiff has been given numerous opportunities to question the jurisdiction of the trial court and the other Arizona courts through which he has processed his litigation. Notably, in the case of Cocke v. Transamerica Title Insurance Co. of Arizona, 16 Ariz. App. 556, 494 P.2d 756, the court dealt at length with each of the jurisdictional arguments of plaintiff, which are sought to be relitigated in the Federal District Court. In that case, the Court stated:

> "This Court is initially faced with a 'jurisdictional' attack raised by appellant. At the time of oral argument, appellant

contended that this appeal should be dismissed because the trial court lacked jurisdiction to enter the judgment appealed from. Because this issue had not previously been raised in this case before this Court, appellant was granted leave to file a supplemental memorandum on this issue and appellee was granted time to file a response thereto.

2. James Stewart Company is not a party to or involved in this appeal.

3. This Court has previously, in Cocke v. Cocke, 13 Ariz. App. 57, 474 P.2d 64 (1970), determined that Mrs. Cocke's interest in this real property was not sub-

Appellant has filed a twenty-three, legal-size page, memorandum in this Court which, distilled to its bare bones, contends the trial court lacked jurisdiction in this matter for the following reasons:

(1) Because Transamerica's counterclaim for attorney's fees was based upon only one provision of the escrow instructions - granting the escrow agent attorney's fees - "it is elemental that a party to a contract cannot come into court seeking the enforcement of only its claimed rights under selected provisions of the contract, without regard to its obligations under the other provi-

sions also incorporated into its pleadings, since such relief is beyond the power or jurisdiction of the court to grant."

(2) Transamerica did not join the other party to the escrow instructions in its counterclaim for attorney's fees and such other party was 'indispensable'.

(3) Since Transamerica's counterclaim did not join the minor beneficiaries of a trust formed by Mr. and Mrs. Cocke, the trial court was without jurisdiction to proceed.

"Turning to the last 'jurisdictional' argument first, as we have previously pointed out in a footnote, our decision in Cocke v. Cocke, supra, held that the interest of Mrs. Cocke in the real property involved in this sale was not subject to any trust. To argue at this late date that the beneficiaries of that trust still have an interest in the disposition of this real property and therefore are indispensable parties, not only taxes the patience of this Court but calls into serious question the advocacy of appellant's counsel.

"The appellant's first 'jurisdictional' ground is also without merit. There is no contention that the trial court did not obtain personal jurisdiction over appellant and appellee and that they were not properly before the Court. There is likewise no contention that the trial court

lacked subject matter jurisdiction to determine whether Transamerica was guilty of negligence or breach of fiduciary duty in administering the escrow agreement. If we understand appellant's argument correctly, it is that if a person is a party to a contract, one provision of which allows a prevailing party attorney's fees in any litigation arising out of that contract, the party to that contract may not sue under that provision alone because to do so in some manner fails to consider all the other provisions of the contract and thus would abrogate those other provisions which the court has no jurisdiction to do. To state the proposition is to show its preposterousness. Admittedly, the trial court might err in determining that a party is entitled to attorney's fees, but 'error' and 'jurisdiction' are two wholly separate and distinct concepts, and jurisdiction is not involved in the foregoing situation.

"Appellant's next argument that the buyers under the escrow instructions were 'indispensable parties' to Transamerica's counterclaim against appellant is also without merit. Transamerica's claim for attorney's fees arose out of and only out of defending appellant's alleged claim against it. It was appellant and only appellant who caused Transamerica to incur the

> attorney's fees claimed. In such circumstances neither the buyers nor any other party to the escrow agreement would even be proper parties to Transamerica's claim for attorney's fees, let alone indispensable parties.
>
> "For the foregoing reasons we hold the trial court had jurisdiction to determine the issues placed before it."

In the case of Sexton v. Berry (5th Cir., 1956), 233 F.2d 220, a very analogous case, the court held:

> "It is shown upon the fact of this complaint that appellant regularly invoked the jurisdiction of the state court, the case was tried, judgment was rendered and eventually affirmed by the Supreme Court of Ohio. It is clear that appellant was not denied due process of law or the equal protection of the law under the Civil Rights Act, 42 U.S.C.A. §1981 et seq. This Act does not create an exception to the general principle that a decision of the state court may not be reviewed by bill in equity in a federal court. Davega-City Radio, Inc., v. Boland, Supra; Bottone v. Lindsley, 10 Cir., 170 F.2d 705." (At page 226)

In the case of Scott v. California Supreme Court, 426 F.2d 300 (9th Cir., 1970), the court unequivocally held that where the plaintiff had simply lost his case in the state courts and since the state courts

had valid jurisdiction, plaintiff was absolutely precluded from collaterally attacking the judgments of the state courts under the guise of the Civil Rights Act. Other cases holding that a party is collaterally estopped from attacking valid state court judgments are: Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir., 1973); Bricker v. Crane, 468 F.2d 1228 (1st Cir., 1972); P. I. Enterprises, Inc., v. Cataldo, 457 F.2d 1012 (1st Cir., 1972); Lynch v. International Banking Corp., 31 F.2d 942 (9th Cir.), certiorari denied, 280 U.S. 571.

ARGUMENT NO. 2

The principles of res judicata preclude the same parties from relitigating in federal court the same issues that have been litigated in state court.

It is a well established principle of United States District Court jurisdiction that the Federal court is without power to compel relitigation of a case already adjudicated in a state court of competent jurisdiction. In the case of Sexton v. Berry (5th Cir., 1956), 233 F.2d 220, the Court held:

> "What appellant asks is that this court order the District Court to relitigate the same issues which have now been finally disposed of by the Supreme Court of Ohio in a judgment binding on this court. As held by this court in General Exporting Co. v. Star Transfer Line, 6 Cir., 136 F.2d 329, 335, a federal District court will not function

as a court of review for the state court. The District Court there dismissed an action praying that proceedings in the state court be declared null, void and of no effect and this court affirmed the decision of the District Court, stating:

> "'The attempt to relitigate in federal courts issues already determined in state court proceedings has been disapproved in numerous opinions of United States Courts below the grade of the Supreme Court. Ritholz v. North Carolina State Board of Examiners in Optometry, D.C.N.C., 18 F. Supp. 409, 413 (three-judge court); Davega-City Radio v. Boland, D.C.N.Y., 23 F.Supp. 969, 970 (three-judge court); Hall v. Ames, 1 Cir., 190 F. 138, 140, 141; Furnald v. Glenn, 2 Cir., 64 F. 49, 54.'

"Cf. Davega-City Radio, Inc., v. Boland, D.C.S.D.N.Y., 23 F. Supp. 969, 970, in which the court declared:

> "'There is also a further reason why the suit must be dismissed, namely, the principle that a decision of a state court may not be reviewed by bill in equity in a federal court. American Surety Co. v. Baldwin, 287 U.S. 156, 164, 53 S.Ct. 98, 100, 77 L.Ed. 231, 86 A.L.R.

> 298; Lynch v. International Banking Corp., 9 Cir., 31 F. 2d 942, certiorari denied, 280 U.S. 571, 50 S.Ct. 28, 74 L.Ed. 624; Furnald v. Glenn, 2 Cir., 64 F. 49, 54; Ritholz v. North Carolina State Board, D.C.M.D.N.C., 18 F.Supp. 409, 413. Here the plaintiff has presented to the state court the same questions as to the jurisdiction of the state Board that it wishes this court to decide. The issue having been decided adversely to it, its remedy is appeal through the appropriate state courts and, if necessary, review by the Supreme Court of the United States. It cannot obtain a review by this independent suit in the federal court.'
>
> "See also H.J. Heinz Co. v. Owens, 9 Cir., 189 F.2d 505, 509." (At pages 225-226)

In the recent case of Francisco Enterprises, Inc., v. Kirby, 482 F.2d 481 (9th Cir., 1973), wherein plaintiff filed a complaint in the United States District Court seeking injunctive relief on the basis of violations of the First, Fourth, Fifth and Fourteenth Amendments and for violations of the Civil Rights Act by reason of an adverse determination of the California Department of Alcoholic Beverage Control, the court held:

> "Res judicata principles have been consistently applied to

> preclude parties from relitigation of federal constitutional claims in a federal district court subsequent to an adverse determination on the merits of such claims by a state court of competent jurisdiction. The sole recourse for the losing litigant is by appeal or writ of certiorari to the United States Supreme Court."

ARGUMENT NO. 3

Conclusionary allegations of conspiracy unsupported by any factual allegations, do not state a claim under the Civil Rights Act.

A thorough reading of the plaintiff's Complaint with reference to Transamerica will reveal that the plaintiff has merely set forth in a shotgun approach a barrage of unrelated statements accompanied by his subjective conclusion that the defendant Transamerica was in a conspiracy with the other defendants to deny the plaintiff one or more of his alleged civil rights. It is fundamental that upon a Motion to Dismiss only the material facts and not the unsupported conclusions of the pleader are considered in determining whether the Complaint states a claim under the Civil Rights Act. Chessman v. Teets, 350 U.S. 3; Lewis v. Brautigan (Civ. 5, Fla.), 227 F.2d 124, 55 A.L.R.2d 505; Dunn v. Gazzola (CA 1, Mass.), 216 F.2d 709; Scott v. Empire Land Co. (5th Cir.), 24 F.2d 417; Sexton v. Berry (6th Cir.), 233 F.2d 220.

In Oppenheimer v. Roth, 468 F.2d 901 (9th Cir., 1972), the court held that the

district court was without subject matter jurisdiction under the Civil Rights Act in a pro per complaint that merely alleged the legal conclusion of a violation of civil rights.

In the case of Reese v. Nixon, 347 Fed.Supp. 314 (C.D.Ca., 1972), the court found that a civil rights complaint against various federal, state, county and city officers, including the President of the United States, contained merely bald conclusions and assertions that the defendants had conspired to deprive plaintiffs of their civil rights, and that these conclusionary allegations, unsupported by any factual data, were insufficient to state a claim under the Civil Rights Act. The court, in dismissing the complaint, further stated:

> "In addition, merely characterising the defendants' conduct as conspiratorial does not constitute allegations upon which relief in a civil rights action can be granted."

CONCLUSION

Plaintiff's complaint was founded solely upon the unwarranted assumption that the state court was without jurisdiction, when the irrefutable facts are that the state courts not only had jurisdiction over the real property, the subject matter, but also over the person of plaintiff Francis M. Cocke who himself invoked that personal jurisdiction. Since the state courts clearly had jurisdiction and so ruled, plaintiff cannot relitigate that question under the guise of the Civil Rights Act.

Finally, the mere conclusionary allegation of a violation of the Civil Rights Act does not afford federal court review of lawful state court proceedings. In addition, plaintiff's complaint was a sham of subjective conclusions, was violative of Rule 8(a) of the Federal Rules of Civil Procedure, and was subject to dismissal by reason of its redundant and prolix nature. Agnew v. Moody, (9th Cir.1964), 330 F.2d 868. The application for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

IRWIN S. CANTOR, et al., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PET

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION AND JUDGMENTS BELOW

These Defendants agree with the Petitioner's summary of the opinion and judgments below.

JURISDICTION

These Defendants agree with the Petitioner's assertion of jurisdiction in this court.

QUESTIONS PRESENTED

The Petitioner claims that the question relevant to these Defendants is whether the Civil Rights Act permits a federal court to review state court judgments entered in violation of the Petitioner's right to due process of the law, because the state court lacks subject matter jurisdiction over the actions in which those judgments were entered. (Petition, p. 14). That question

is moot in this case. The district court held it had jurisdiction and dismissed the complaint for failure to state a claim upon which relief could be granted, finding that the state court did have subject matter jurisdiction, so the judgments were not entered in violation of the Petitioner's constitutional rights. The question is, therefore, whether the district court erred in so holding.

STATEMENT OF THE CASE

The Petitioner, his ex-wife, and a trustee, holders of varying interests in a certain piece of land, agreed to sell that land in 1968. After a series of events, including a dispute between the Petitioner and his ex-wife over payment instructions and refusal of the Petitioner to execute certain documents, the buyers brought suit for specific performance of the sales

agreement. James Stewart Co. v. Cocke, Civil No. C-222. 472 (Maricopa Cty., Ariz. Super. Ct., filed April 22, 1969). In a series of judgments, the trial court dismissed the Petitioner's Counter- and Crossclaims against his wife and other parties in the specific performance action. James Stewart Co. v. Cocke, supra, (Nov. 10, 1970), aff'd sub nom. Cocke v. Transamerica Title Ins. Co., 16 Ariz. App. 556, 494 P. 2d 746 (1972). Finally, it entered judgment against the Petitioner on the complaint for specific performance and ordered the sale consummated. The Arizona Court of Appeals dismissed the Petitioner's appeal from this judgment, saying, "It is the opinion of this Court that the appeal is frivolous." James Stewart Co. v. Cocke, No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). The Petitioner did not appeal this dismissal to the Arizona

Supreme Court.

The Petitioner then brought this suit under the Civil Rights Act in the federal district court, naming as defendants practically every party, attorney and judge who had anything to do with the case in state court. This brief is filed on behalf of Ms. Whitney and Mr. Gillenwater, who served as attorneys for the Plaintiff's ex-wife and the escrow agent, respectively. The only allegation in the Petitioner's complaint pertaining to these two defendants was as follows:

> "Under pretense and color of state law and authority, such other parties to the agreement, their attorneys-at-law, and the three judges by joint and several action with discriminatory intent and purpose have subjected

> or caused to be subjected the Petitioner Cocke to the deprivation of equal rights, privileges and immunities . . . including deprivation of his right to like access to the courts." (Petitioner's Appendix, p. 4).

The federal district court dismissed the Petitioner's suit for failure to state a claim upon which relief could be granted, in essence, holding that since the state courts had jurisdiction over the person and property, the Civil Rights Act cannot be used as a guise to religate substantive questions of law.

The Ninth Circuit Court of Appeals granted the Defendants' Motion to Affirm. Cocke v. Cantor, et al., No. 74-1997 (Oct. 7, 1974). This Petition for Certiorari followed.

ARGUMENT NO. 1

The federal district court was correct in finding that the state court had subject matter jurisdiction in the original litigation.

When a federal court receives a complaint alleging a massive conspiracy including attorneys and judges to misuse the judicial process by forcing a judgment on someone without having jurisdiction over the action, we agree that the federal court has jurisdiction to determine whether the complaint states a cause of action under the Civil Rights Act. In this case the Petitioner alleged that the judgments violated his right to due process of law because the court had no jurisdiction over the subject matter of his case. The lower district court held that the state court did have subject matter jurisdiction over

the lawsuit, so the actions of the Defendants, their attorneys, and the judges did not result in a denial of the Petitioner's civil rights. Hence, the federal court said, the Petitioner's complaint did not state a claim upon which relief could be granted. (Petitioner's Appendix, p. 161).

The question of jurisdiction can best be answered by a cursory examination of the first page of the original 43-page Answer and Counterclaim filed by the Petitioner in the Superior Court of Maricopa County in June of 1969. The first page of the Answer and Counterclaim clearly shows that the Petitioner himself invoked the jurisdiction of the Superior Court in June of 1969. No citations are needed to advise this Court that the filing of the Answer and Counterclaim by Francis M. Cocke clearly gave

the Superior Court jurisdiction over the person of Francis M. Cocke. Likewise, the legal description of the real property attached to the complaint shows that the property involved in the state court litigation is located in Maricopa County, Arizona. The Superior Court of the State of Arizona clearly had jurisdiction over the real property located in Maricopa County, which was the sole subject matter of Mr. Cocke's protracted litigation. It is respectfully submitted that the state court, having jurisdiction over both the person and property of the Plaintiff, had jurisdiction to enter the three judgments which Plaintiff now seeks to relitigate under the Civil Rights Act. The Petitioner has been given numerous opportunities to question the jurisdiction of the trial court and the other Arizona courts. Notably, in Cocke v. Transamerica Title Ins. Co.,

16 Ariz. App. 556, 494 P. 2d 756 (1972), the court dealt at length with each of the jurisdictional arguments of the Petitioner, which are sought to be relitigated in this Court. In that case, the court stated:

> "This Court is initially faced with a 'jurisdictional' attack raised by appellant. At the time of oral argument, appellant contended that this appeal should be dismissed because the trial court lacked jurisdiction to enter the judgment appealed from. Because this issue had not previously been raised in this case before this Court, appellant was granted leave to file a supplemental memorandum on this issue and appellee was granted time to

file a response thereto. Appellant has filed a twenty-three, legal-size page, memorandum in this Court which, distilled to its bare bones, contends the trial court lacked jurisdiction in this matter for the following reasons:

(1) Because Transamerica's counterclaim for attorney's fees was based upon only one provision of the escrow instructions--granting the escrow agent attorney's fees--'it is elemental that a party to a contract cannot come into court seeking the enforcement of only its claimed rights under selected provisions of the contract,

without regard to its obligations under the other provisions also incorporated into its pleadings, since such relief is beyond the power or jurisdiction of the court to grant.'

(2) Transamerica did not join the other party to the escrow instructions in its counterclaim for attorneys' fees and such other party was 'indispensable'.

(3) Since Transamerica's counterclaim did not join the minor beneficiaries of a trust formed by Mr. and Mrs. Cocke, the trial court

was without jurisdiction to proceed.

Turning to the last 'jurisdictional' argument first, as we have previously pointed out in a footnote, our decision in Cocke v. Cocke, *supra*, held that the interest of Mrs. Cocke in the real property involved in this sale was not subject to any trust. To argue at this late date that the beneficiaries of that trust still have an interest in the disposition of this real property and therefore are indispensable parties, not only taxes the patience of this Court, but calls into serious question the advocacy of appellant's counsel.

[2] The appellant's first 'jurisdictional' ground is also without merit. There is no contention that the trial court did not obtain personal jurisdiction over appellant and appellee and that they were not properly before the Court. There is likewise no contention that the trial court lacked subject matter jurisdiction to determine whether Transamerica was guilty of negligence or breach of fiduciary duty in administering the escrow agreement. If we understand appellant's argument correctly, it is that if a person is a party to a

contract, one provision of which allows a prevailing party attorney's fees in any litigation arising out of that contract, the party to that contract may not sue under that provision alone because to do so in some manner fails to consider all the other provisions of the contract and thus would abrogate those other provisions which the court has no jurisdiction to do. To state the proposition is to show its preposterousness. Admittedly, the trial court might err in determining that a party is entitled to attorney's fees, but 'error' and 'jurisdiction' are two wholly separate and distinct

concepts, and jurisdiction is not involved in the foregoing situation.

[3] Appellant's next argument that the buyers under the escrow instructions were 'indispensable parties' to Transamerica's counterclaim against appellant is also without merit. Transamerica's claim for attorney's fees arose out of and only out of defending appellant's alleged claim against it. It was appellant and only appellant who caused Transamerica to incur the attorney's fees claimed. In such circumstances neither the buyer nor any other party to the escrow agreement would even be proper parties to Trans-

> america's claim for attorney's fees, let alone indispensable parties.
>
> For the foregoing reasons we hold the trial court had jurisdiction to determine the issues placed before it."
>
> 494 P. 2d at 758.

The Petitioner not only has had his day in court, but has had numerous days in court. He has been afforded an opportunity to amend his Counterclaim to state a claim in the Superior Court; to engage in extensive discovery prior to Defendants' Motions for Summary Judgment; respond in writing to the Motion for Summary Judgment and be heard on oral argument prior to the entry of judgment; to object in writing and orally to the form of judgment; to appeal to the Arizona Court of Appeals the granting of the Summary Judgment and to file a

written brief therein and orally argue his defenses; and to be heard on a special action filed in the Arizona Supreme Court to state his own appeal based on the alleged jurisdictional defects. Upon remand of the case to the Superior Court, he was afforded an opportunity to reargue and rehash the same jurisdictional arguments previously made before the trial court, the Court of Appeals, and the Supreme Court; was thereafter afforded an opportunity to object, orally and in writing, to the form of modified judgment directed by the Arizona Court of Appeals; and was thereafter afforded an opportunity to file an appeal from the modified judgment, which appeal the Court of Appeals found to be frivolous. The Petitioner was further afforded an opportunity to seek review by the Arizona Supreme Court, but did not do so. Mr. Cocke raised his jurisdictional argument on at least six

of the above-mentioned occasions, and at each juncture, the appropriate court found that there was jurisdiction over both the person and the property of the Plaintiff.

ARGUMENT NO. 2

The Petitioner's suit against Whitney and Gillenwater, Attorneys, is frivolous and without merit.

The thrust of the Petitioner's argument at the district court level is that the Defendants, in concert, acted to deprive the Petitioner of his constitutional rights to due process of law. Specifically, as it concerns the Respondents Gillenwater and Whitney, the Petitioner fails to state in his complaint any facts upon which a cause of action could be based against these individuals. He simply mentions them as being attorneys for Transamerica and Joan H. Cocke, who

represented their respective clients as to matters not only dealing with the original real estate transaction, but with the subsequent and protracted state court litigations. A cursory review of the record demonstrates that the Petitioner simply attempts to relitigate the issues already tried in state court and to deluge the Court with so many broad facts and conclusory allegations that these Respondents would be caught on the "coattails" of the general allegations of conspiracy and violation of constitutional rights.

That the assertion of the violation of these rights and conspiracy cannot be used as a guise to relitigate substantive issues already adjudicated at the state court level has clearly been held in various cases. See, e.g., Morgan v. Sylvester, 125 F. Supp. 380, aff'd., 220 F.2d 758 (2nd Cir. 1955),

and French v. Corrigan, 432 F. 2d 1211 (7th Cir. 1970). Cf., P.I. Enterprises, Inc. v. Cutaldo, 457 F. 2d 1012 (1st Cir. 1972); Francisco Enterprises, Inc. v. Kirby, 482 F. 2d 481 (9th Cir. 1973).

More specifically, it is well settled that to state a cause of action of any kind against a private attorney who has acted as a representative on behalf of his client, the plaintiff must allege facts which establish one of the recognized grounds for lawyer liability. To establish personal liability, he must allege facts showing that either the attorney personally pledged his own responsibility or failed to disclose his agency, all with respect to his representation of his client, Thornberry v. Board of Education, 8 Ill. App. 351, 290 N.E. 2d 360 (1972), or allege facts which demonstrate that the attorney acted outside his scope of agency and

authority as a representative to the point of committing fraud, conspiracy, or likewise, Pickard v. Maritime Holding Corp., 161 So. 239 (Fla. 1964); Haldane v. Friedman, 22 Cal. Rptr. 445 (Div. 1, Cal. 1962); and other cases collected in Annot., 45 A.L.R. 3d 1181 (relating to liability to third parties). In the case at bar, as noted above, the Petitioner's complaint is patently devoid of allegation that the Defendants Gillenwater and Whitney acted beyond the scope of their authority and roles as attorneys for their clients.

Additionally, there is a whole line of federal court decisions holding that activities of private practitioners conducted solely in their capacity as a representative and counsel for a client are not such that it can be deemed bases for a cause of action under the Civil Rights Act, and in fact

the private practitioner enjoys an immunity from suit. For example, in Kennedy v. Fox, 232 F. 2d 288 (6th Cir. 1956), the court held that a private practitioner who prepared certain papers filed as a first step in proceedings resulting in a person's confinement to a mental institution was not amendable to an action based on the Civil Rights Act. Similarly, in several cases, it has been held that court-appointed attorneys representing a defendant in a criminal proceeding are immune from suit based on the Civil Rights Act, because none of their acts could be considered to be performed under the color of law. French v. Corrigan, 432 F. 2d 1211 (7th Cir. 1970); Brown v. Joseph, 463 F. 2d 1046 (3rd Cir. 1972). The same rationale has been used to cloak a court-appointed attorney with immunity for his acts in representing a trustee in bankruptcy. Smallwood v. United

States, 358 F. Supp. 398 (E.D. Mo. 1973). If a court-appointed attorney is held to be immune from suit under the Civil Rights Act for any activities arising out of his representation of a client, even more so a private practitioner who is not court appointed should be cloaked with immunity from suit arising out of the Civil Rights Statute.

CONCLUSION

The Respondents Gillenwater and Whitney respectfully submit that the Petitioner presents to questions which are substantial and require the submission of their brief, oral arguments, and the written opinion of this Court; therefore, the Petition for Certiorari should be summarily dismissed.

Respectfully submitted,

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I hereby certify that on this 29th day of July, 1975, three copies of the Brief in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOAN H. COCKE, Respondent

The Respondent, JOAN H. COCKE, respectfully represents that the Writ of Certiorari should not be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit entered October 7, 1974.

REVIEW ON WRIT OF CERTIORARI SHOULD NOT BE GRANTED

1. The State Court has not decided a Federal question within the meaning of Supreme Court Rule 19(a). The terms of the Civil Rights Act upon which Petitioner relies, refer to civil rights in every State and Territory and to State and Territorial laws which would deprive any citizen of the United States or other person within the jurisdiction thereof to any right, privilege or immunity secured by the Constitution and laws (P. 3,4,5). The questions presented by Petitioner (P.2) do not purport to claim relief because of any alleged denial of due process under a State law. The questions presented refer only to State Court orders and the alleged conclusion that the State Courts lacked jurisdiction over the State actions. No State statute denied Petitioner equal rights under the due process clause of the Constitution (Rice v. Sioux City Memorial Park Cemetery, Inc. 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed 897).

2. The Court of Appeals has not rendered a decision in conflict with the decision of another Court of Appeals on the same matter. The Petitioner claims this to be true (P. 14). In the case of Paul v. Dade County 419 Fed. 2d 10, cited by Petitioner, the Circuit Court found that the State Court had determined the Constitutional issue in a prior action and that the District Court lacked jurisdiction to reconsider the same issues (P. 14). The District Court in the case of Concerned Consumers League v. O'Neill, 371 Fed. Supp. 644 dealt with facts which were in violation of the freedom of

religion under provisions of the First Amendment to the Constitution of the United States. This case cited by Petitioner is not relevant as Petitioner is concerned with the application of the Civil Rights Act, 42 U.S.C. §1981-1988 to the facts of the present question to determine whether or not he has been given due process of law under State judgments within the meaning of the Fourteenth Amendment to the Constitution of the United States.

3. The Court of Appeals has not decided an important State or Territorial question in a way in conflict with applicable State or Territorial law; and has not decided an important question of Federal law which has not been, but should be, settled by the Supreme Court of the United States; and has not decided a Federal question in a way in conflict with applicable decisions of the Supreme Court of the United States.

The Court of Appeals sustained the judgment of dismissal of the District Court which stated that the gravamen of the complaint is that the State Judicial System was perverted by the Defendants to result in the judgments against Plaintiff (Petitioner) in contravention of the Fourteenth Amendment. In this connection the District Court further stated it is not made clear how any one individual acted alone or in conspiracy to accomplish such a result. It (complaint) wholly fails to show any conspiracy. As a result, the District Court found "the complaint does not state a claim under the Civil Rights Act" Scott v. California Supreme Court 426 F.2d 300 (9th Cir. 1970); Fed. R. Civ. P. 12(b)(6). (A Vol. II, pp 160, 161)

4. The Court of Appeals has not departed from the accepted and usual course of judicial proceedings, nor has it sanctioned such a departure by the District Court, as to call for an exercise of the Supreme Court's power of supervision. Respondent submits the following argument in support of this conclusion as to why the Writ should not be granted.

PETITIONER'S QUESTIONS

1. The first question presented by Petitioner submits the proposition that the Writ be granted for the purpose of reviewing and vacating the decisions of the Arizona Court because the State Court lacked subject matter jurisdiction over the action. Whether the State Court lacked subject matter jurisdiction over the action is a conclusion reached by Petitioner alone.

2. The second question with respect to judicial immunity is also based on Petitioner's conclusion that the State Courts lacked subject matter jurisdiction over the actions.

It is clear that the Arizona Court dealt with a specific performance action for the purchase and sale of land within the State of Arizona and that all parties were Arizona residents and were properly in Court.

Petitioner has three reasons for claiming that the Arizona Courts lacked subject matter jurisdiction. He calls them ALTERATION OF CONTRACTS, INDISPENSABLE PARTIES, and WANT OF FINDINGS (P.12).

It can be said with respect to these three reasons that Petitioner is unable to distinguish between what constitutes jurisdiction and a court's power to exercise this jurisdiction. The Supreme Court of the United States has made this distinction in the case of General Inv. Co. v. New York Cent. R. Co., 271 U.S. 228, 70 L.Ed. 920, 46 S. Ct. 496, and has stated:

> "...By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits... Whether a plaintiff seeking such relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction...If it be resolved against him, the appropriate decree is a dismissal for want of merits, not for want of jurisdiction."

The District Court also considered Petitioner's reasons for stating that the State Courts did not have jurisdiction. The District Court stated:

> Plaintiff's first attack is on the jurisdiction of the state courts to decide the real estate dispute. His premise for this contention

> is that the courts proceeded to judgment in the absence of "indispensable parties." It is well settled that the considerations in rule 19(b) are equitable, not jurisdictional. "To say that a court 'must' dismiss in the absence of an indispensable party and that it 'cannot proceed' without him puts the matter the wrong way around: a court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119, 88 S.Ct. 733 (1968) (Footnote omitted); see Jacobs v. United States, 367 F. Supp. 1275, 1281-84 (D. Ariz. 1973).
>
> Once this linchpin falls, plaintiff's complaint states no more that the history of a complex, sometimes confused litigation. (A Vol. II, p 160)

It is Respondent's position that Petitioner's conclusion that the State Courts lacked subject matter jurisdiction is not supported by the law or the decisions of the courts.

CIVIL RIGHTS STATUTES NOT APPLICABLE

A quick glance at the United States Code, Title 42, §§1981-1988 reveals that these sections are not applicable to the present situation. §§1981 and 1982 were enacted for the sole purpose of granting equal rights to citizens of all colors who may be deprived of such rights because of their color.

§1983 protects every person from deprivation of rights, privileges and immunities by any State by reason of a State statute, ordinance, regulation, custom or usage. In the instant case we are not dealing with State enactments but with Court proceedings and judgments.

An argument should not be necessary with respect to the meaning of §1985(3) and §1986. Griffin v. Breckenridge 91 S.Ct. 1790 403 U.S. 88 29 L.Ed. 2d 338.

The United States District Courts have had occasion to determine whether or not the Civil Rights statutes entitled a litigate to seek redress from State Court judgments in the United States District Courts.

In the case of Sexton v. Barry, 233 F.2d 220, the Court dismissed a complaint based on issues previously decided in a State Court and stated that:

> The mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property, does not show that there has been a violation of

> the due process of law guaranty... The doctrine of due process does not confer the right to litigate the same question twice... The equal protection of law implies that all litigants similarly situated may appeal to courts for both relief and defense under like conditions, with like protection, and without discrimination... Appellant had due process and the equal protection of the laws.

The Court concluded as follows:

> It is shown upon the face of this complaint that Appellant regularly invoked the jurisdiction of the state court, the case was tried, judgment was rendered and eventually affirmed by the Supreme Court of Ohio. It is clear that Appellant was not denied due process of law or the equal protection of the law under the Civil Rights Act, 42 U.S.C.A., §1981 et seq. This Act does not create an exception to the general principle that a decision of the state court may not be reviewed by bill in equity in a federal court...

In the case of Dotlich v. Kane 497 F.2d 390, the Eighth Circuit dismissed an action under Civil Rights Act against

judges, title examiner, clerk and wife's attorney. The action alleged a conspiracy by all Defendants to deprive Plaintiff of his property interest in the family homestead without due process of law. Apparently the Plaintiff referred only to his divorce proceedings in the State Court to support such a claim. The Court held such a claim, arising as it does from the ordinary disposition of a divorce action in State Court, raises no Federal question.

In sum, the complaint states no Federal claim against any of the Defendants, and additionally, the subject matter of the complaint -- an objection to the distribution of the property in a divorce action -- is not within the jurisdiction of the Federal District Court. Thus we affirm the dismissal of the action.

In connection with the above case it should also be noted that the Petitioner and this Respondent were once husband and wife and that the underlying payment dispute mentioned by Petitioner (A Vol. I pp 14, 15 & 16) and referred to by the District Court (A Vol. II p 158) was one of the elements involved in the escrow in the specific performance action upon which the present action is based. Cocke v. Cocke 13 Ariz. App. 57, 474 P.2d 64.

The Petitioner's theory that the State Courts lacked subject matter jurisdiction because of alteration of contracts is conclusively refuted by the decision of the Arizona Court of Appeals in the case of Cocke v. Cocke, Supra, wherein the facts concerning the trust, proceeds of sale and the lack of interest of the

trustee, were found.

> First it should be noted that the trust agreement was the subject of extensive litigation in the original divorce proceedings, and there is no contention by defendant that he was not aware of its terms.
>
> After the decree of divorce was entered and when defendant desired to sell a portion of his separate property including a portion in which he held an undivided one-half interest with the trustee, defendant prevailed upon plaintiff to execute a letter to the trustee requesting the execution of the deed to defendant's buyer, without any indication to the trustee that the proceeds of this sale would be held in trust. One of the inducements made by defendant to plaintiff, testified to by plaintiff, was that the funds received from the sale would be free and clear of the trust. The sales contract and escrow instructions did not in any manner reflect the interest of the trustee in a portion of the property sold. After the sale was completed the parties made arrangements with the First National Bank as a collection

> agent to receive the proceeds of the sale of the property and to this end opened a checking account with that institution which required the signature of both plaintiff and defendant to withdraw funds therefrom. Again, this account does not in any manner refer to an underlying interest of the trustees in the proceeds of this sale.
>
> In such a case, where defendant, having knowledge of the revocable nature of the trust, has acted in a manner to cause a trustee to divest itself of its interest in a portion of that trust res in reliance upon the revocable feature of the trust, has purportedly induced others to act in reliance upon the revocable nature of the trust, and all of the defendant's acts after the fact are consistent with the trust being revocable, we hold that defendant is estopped to now assert that the trust is now irrevocable under the provisions of the property settlement agreement entered into between the parties in 1964.

Another case growing out of a previous divorce action in the State Court is the case of Hill v. McClellan, 490 F.2d 859. In this case the action

was commenced under the Civil Rights Act and again the Defendants were the judge, attorney and the Plaintiff's ex-wife. The Fifth Circuit held that a private person cannot be held liable under 42 U.S.C. §1983 unless his wrongful action was done under color of State law or State authority. Further, a private person alleged to have conspired with a State judge and attorney who are entitled to immunity cannot be held liable, since he is not conspiring with persons acting under color of law against whom a valid claim could be stated. A Federal District Court has no original jurisdiction to reverse or modify the judgment of a State Court.

This same Circuit in the case of Hanna v. Home Insurance Company 281 F.2d 298, certiorari denied 81 S.Ct. 751, 365 U.S. 835, 5 L.Ed (2d) 747, rehearing denied 81 S.Ct. 1905, 366 U.S. 955, 6 L. Ed. (2d) 1247 was also asked to review a State Court judgment on the theory that Plaintiff was deprived of his Constitutional rights and that §1983 of the Civil Rights Act provided a remedy for damages. In this case the Court held

> The able district judge, who had the benefit of a pre-trial conference and of presiding over the trials on the motions to dismiss, construed the suit as an effort to relitigate the state litigation and to obtain a review of the decisions of the Texas courts and reversal of the Hanna decisions for error. Accordingly, the court below dis-

missed the complaint on the ground that it failed to state a claim within the original jurisdiction of the district court.

A federal district court has no original jurisdiction to reverse or modify the judgment of a state court... Unless alleged errors constitute a deprivation of constitutional rights, they may be reviewed only by the United States Supreme Court...

Turning to the Civil Rights Statutes, we find that Section 1981 of Title 42 U.S.C.A., although it provides all persons are entitled to equal rights under the law, has no provision for civil damages. Section 1983 affords a civil action for damages against a person who, acting under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution and laws. In this case, Hanna asserts his cause of action for damages against Home Insurance Company only. It is clear that Home Insurance Company was not acting under color of state law; Section 1983 therefore is inapplicable. Morever, Section 1983 does not provide a cause of action for a conspiracy to deny due

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b

> process; there must be an actual denial of due process before a cause of action arises...
>
> The issue then is narrowed to the question whether Hanna states a complaint under Section 1985 for damages as a result of a conspiracy to deprive him of equal protection of the law. He must show a purposeful conspiracy to deny him due protection; mere errors or irregularities in the state court proceedings are not sufficient...

CONCLUSION

Respondent, JOAN H. COCKE, respectfully submits that the Petition for Certiorari is without merit and should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 1975, three copies of the Brief in Opposition to Petition for a Writ of Certiorari, Joan H. Cocke, Respondent, were served on each party separately represented by depositing the same in the United States Post Office at Phoenix, Arizona, first class postage prepaid, addressed to counsel of record at their respective post office addresses as hereinafter set forth. I further certify that all parties required to be served have been served.

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July 24, 1975

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IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT E. KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, ARLEIGH H. BURTON, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a brief in opposition to the petition of Francis M. Cocke for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered

on October 7, 1974. The brief is due July 24, 1975.

OPINION AND JUDGMENTS BELOW

Respondents agree with the Petitioner's summary of the opinion and judgments below.

JURISDICTION

Respondents agree with the Petitioner's statement of jurisdiction in this Court.

QUESTIONS PRESENTED

On page 2 Petitioner maintains the question presented to be whether his pro se complaint, predicated upon the Civil Rights Act, should have been dismissed with prejudice where the relief sought was review and vacation of state court orders which allegedly denied Petitioner due process of law, on grounds the state court lacked subject matter jurisdiction. On page 14 Petitioner states the question differently. There he says the question is whether the Civil Rights Act permits the federal court to review state court's judgments entered in violation of the Petitioner's right to due process of law.

The Respondents submit that neither proposition states the question presented. The District Court held that it had jurisdiction under the Civil Rights Act to review constitutional issues not litigated in the

state court. It examined Petitioner's alleged wrong, i.e. that the state court proceeded to judgment without "indispensable parties" and, therefore, without jurisdiction, concluding Rule 19(b) considerations were equitable, not jurisdictional. It held that the state court had jurisdiction, and by reason thereof the Petitioner's complaint failed to state a cause of action. Therefore, the question presented is whether the District Court erred in so holding.

STATEMENT OF THE CASE

The action arises out of a real estate transaction and resulting state court litigation. Respondents are practically every party, attorney and judge who were in any way involved with the case.

In 1964 Petitioner and his ex-wife made a property settlement agreement, pursuant to which a trust was established. They were divorced in 1967. Certain property held by them and the trustee was agreed to be sold in 1968 to James Stewart Company (or its nominee the Respondents Horne). Transamerica Title Insurance and Trust Company (hereinafter referred to as Transamerica) was the escrow agent. A dispute arose between the Petitioner and his ex-wife over payment instructions and after the refusal of the Petitioner to execute certain documents

the buyers brought suit for specific performance. James Stewart Co. v. Cocke, Civil No. C-222472, Maricopa Cty., Ariz. Super. Ct., filed April 22, 1969. Transamerica was joined in this action as an additional defendant by Petitioner seeking damages for the alleged mishandling of the escrow transaction. It answered and counterclaimed against Petitioner seeking attorneys' fees and costs. Thereafter it moved for summary judgment which was granted, resulting in an award of attorneys' fees. The underlying payment dispute between Petitioner and his ex-wife was litigated in post-divorce proceedings in which the court held, among other things, that the sale property had been placed outside of the trust. Cocke v. Cocke, Civil No. D-89833 (Maricopa Cty., Ariz. Super. Ct., filed December 31, 1968 and March 15, 1969), aff'd. 13 Ariz. App. 57, 474 P.2d 64 (1970).

In a series of judgments the state trial court dismissed the Petitioner's counter and cross-claims against his ex-wife and other parties in the specific performance action, James Stewart Co. v. Cocke, supra, (November 10, 1970), aff'd. sub. nom., Cocke v. Transamerica Title Insurance Co., 16 Ariz. App. 556, 494 P.2d 756 (1972), and entered judgment against Petitioner ordering the sale consummated. James Stewart Co. v. Cocke, supra, (September 27, 1972). A subsequent appeal to the Arizona Court

of Appeals was dismissed on the grounds of not being timely filed. *James Stewart Co. v. Cocke*, Civil No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). Following denial of Petitioner's motion for rehearing, no further state court action was taken by him. However, he refused to comply with the judgment of September 27, 1972 and Respondents James Stewart Company and the Hornes, upon application to the state trial court, obtained a writ of assistance to enforce the September 27, 1972 judgment. (Petitioner's Appendix, pp. 130-152).

Petitioner then brought this suit under the Civil Rights Act in the federal district court. The defendants below and Respondents herein filed motions to dismiss on various grounds.

The District Court dismissed the Petitioner's complaint with prejudice. The Ninth Circuit Court of Appeals affirmed the District Court's action pursuant to Respondent's motion to affirm, *Cocke v. Cantor, et al.*, No. 74-1997 (October 7, 1974), and this petition followed.

ARGUMENTS

I

Jurisdiction is conferred upon the district court, 28 U.S.C.A. §1343, to review state court judgments entered

in violation of Petitioner's right to due process of law as protected by the Civil Rights Act. 42 U.S.C.A. §1981 et seq.

As justification for granting the writ of certiorari Petitioner asserts, pursuant to Rule 19, that the lower courts are not in accord as to whether a federal court has jurisdiction to review state court judgments entered in violation of Petitioner's right to due process of law. In support of this contention Petitioner cites Paul v. Dade County, 419 F.2d 10 (5th Cir. 1969), cert. den., 397 U.S. 1065 (1970) and Concerned Consumer's League v. O'Neill, 371 F.Supp. 644 (E.D. Wisc. 1974). Petitioner contends that the court in the Paul case, supra, found that the district court had no jurisdiction to review a state court's judgment, while the court in Concerned Consumer's League, supra, found that a federal district court did have jurisdiction to review a state court's judgment. Upon a closer examination, it is apparent that these decisions: (1) do not show a conflict between the circuits[1]; (2) do not conclude as Petitioner has sug-

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[1] Conceivably, Petitioner might have argued that the Ninth Circuit's affirmance of the District Court in this case, which held that it had jurisdiction to review the

gested; and, (3) are both distinguishable from the case at bar.

Petitioner has failed to show a conflict between the circuits as Paul v. Dade, supra, is a decision rendered by the Fifth Circuit and Concerned Consumer's League, supra, is a decision rendered by a federal court for the Eastern District of Wisconsin. [2] Furthermore, the holding in neither case is consistent with Petitioner's interpretation. The court in Paul, supra, did not address itself to the issue of whether a federal court can review a state court judgment entered in alleged violation of due process pursuant to the Civil Rights Act. The court states that a federal district court is without jurisdiction to hear federal constitutional claims already litigated in state court where there is an appealable judgment by a state court at the time the federal suit is instituted. The court in effect held that constitutional issues sought to be raised in federal district court which

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state court judgments allegedly rendered in violation of Petitioner's civil rights, conflicts with the Fifth Circuit's holding in Paul v. Dade, supra. However, for reasons set forth such an argument would be without merit.

[2] See Footnote 1.

were previously raised, determined and denied in a prior state action are not issues which the federal district court has jurisdiction to reconsider.

The court in Concerned Consumer's League, supra, likewise never addressed itself to the issue of a federal court's ability under the Civil Rights Act to review a state court judgment entered in alleged violation of the Petitioner's right to due process. There the court referred to the district court's ability to render a decision enjoining the enforcement of a state court's injunction. The court referred to the federal anti-injunction statute saying that actions initiated under 42 U.S.C.A. §1983 of the Civil Rights Act were excepted from that limiting statute and that the court was not restricted from prohibiting enforcement of a state court injunction.

Moreover, both of these cases are distinguishable from the case at bar. In Paul, supra, the plaintiff brought an action in a state court alleging violation of his constitutional right of freedom of religion. In a subsequent federal action, predicated on the Civil Rights Act, he attempted to relitigate the same constitutional issues. Here, Petitioner did not allege violation of his constitutional rights in the state court action. The court's holding in Paul, supra, with respect to jurisdiction of the federal district

court is, therefore, distinguishable from the instant case.

In Concerned Consumer's League, supra, the court addressed itself to the issue of whether the federal anti-injunction statute would limit the court's ability under the Civil Rights Act to prohibit enforcement of a state court injunction. Certainly the instant action does not involve a state court injunction nor the federal anti-injunction statute and is, therefore, distinguishable from Concerned Consumer's League, supra.

The decision of the District Court in the present action is fully in accord with several major decisions of this Court, which has held in the two major cases of Jones v. Mayer Co., 392 U.S. 409, 412 (1968) and Lynch v. Household Finance Corp., 405 U.S. 538, 543, 544 (1972), that the rights to due process of law and equal protection of the laws are guaranteed to any person, and that the remedy for deprivation of such rights is provided by the Civil Rights Act, Title 42 U.S.C.A. §1981, et seq., jurisdiction over the enforcement of which is given to the district court by Title 28 U.S.C.A. §1343. The court in Jones, supra, and Lynch, supra, follows its earlier decisions of Hague v. Committee for Industrial Organization, 307 U.S. 496, 507, 508 (1939) and Douglas v. City of Jeannette, 319 U.S. 157, 161, 162 (1943). In addition, all

of the circuits have referred to and appear to be in accord with these major cases.

The decision herein is not in conflict with the decisions of other circuits nor is it contrary to any decision of this Court. It is clear that the District Court had jurisdiction over any claims of Petitioner arising under the Civil Rights Act. Indeed, it so held in dismissing Petitioner's complaint which action was affirmed by the Ninth Circuit Court of Appeals.

II

The District Court did not err in finding that the state court had jurisdiction in the original litigation.

Petitioner alleges that the judgments entered by the state court violated his right to due process of law because the court had no jurisdiction over the subject matter of his case. The District Court held that the state court did have subject matter jurisdiction, but with regard to the complaint said: (Petitioner's Appendix, pp 160-161.)

> ". . . .[it] failed to demonstrate that the defendants used the courts unequally against him [Petitioner], or that the process was a sham, or that any significant right was denied him [Petitioner]

> without legal justification. It is not made clear how any one individual acted alone or in conspiracy to accomplish such a result. . . .The complaint does not state a claim under the Civil Rights Act." [Brackets supplied.]

The first page of the answer and counterclaim clearly indicates that the Petitioner himself invoked the jurisdiction of the Superior Court in June, 1969. The legal description of the real property attached to the complaint shows that the property involved in the state court litigation was located in Maricopa County, Arizona. Therefore, the Superior Court clearly had jurisdiction over the real property located in Maricopa County, which was the sole subject of Petitioner's litigation. Moreover, as pointed out in Respondent Transamerica's response herein, jurisdiction over the subject real estate escrow is likewise apparent. (Transamerica's Brief in Opposition, p 2.) It is respectfully submitted that the state court having jurisdiction over the person, the property of Petitioner, and subject matter had jurisdiction to enter the judgments which Petitioner now seeks to relitigate under the Civil Rights Act.

The substance of Petitioner's jurisdictional argument is the conten-

tion that the courts proceeded to judgment in the absence of indispensable parties. The District Court addressed itself to that issue saying:

> "It is well settled that the considerations in Rule 19(b) [F.R.C.P.] are equitable, not jurisdictional. 'To say that a court must dismiss in the absence of an indispensable party and that it cannot proceed without him puts the matter the wrong way around: a court does not know whether a particular person is indispensable until it has examined the situation to determine whether it can proceed without him.'" Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119. [Brackets supplied.]

Petitioner's jurisdictional arguments were more specifically set forth in his complaint before the District Court. (Petitioner's Appendix, p 39-50.) These same arguments which Petitioner is attempting to relitigate, were dealt with by the Arizona Court of Appeals in Cocke v. Transamerica Title Insurance Co., 16 Ariz. App. 556, 494 P.2d 756 (1972), where the court stated:

> ". . . .[Petitioner] contends the trial court lacked juris-

diction in this matter for the following reasons:

(1) Because Transamerica's counterclaim for attorney's fees was based upon only one provision of the escrow instructions--granting the escrow agent attorney's fees--'it is elemental that a party to a contract cannot come into court seeking the enforcement of only its claimed rights under selected provisions of the contract, without regard to its obligations under the other provisions also incorporated into its pleadings, since such relief is beyond the power or jurisdiction of the court to grant.'

(2) Transamerica did not join the other party to the escrow instructions in its counterclaim for attorney's fees and such other party was 'indispenable'.

(3) Since Transamerica's counterclaim did not join the minor beneficiaries of a trust formed by Mr. and Mrs. Cocke, the trial court was without jurisdiction to proceed.

Turning to the last 'jurisdictional' argument first, as we have previously pointed out in a footnote, our decision in Cocke v. Cocke, supra, held that the interest of Mrs. Cocke in the real property involved in this sale was not subject to any trust. To argue at this late date that the beneficiaries of that trust still have an interest in the disposition of this real property and therefore are indispensable parties, not only taxes the patience of this Court but calls into serious question the advocacy of appellant's counsel.

(2) The appellant's first 'jurisdictional' ground is also without merit. There is no contention that the trial court did not obtain personal jurisdiction over appellant and appellee and that they were not properly before the Court. There is like-

wise no contention that the trial court lacked subject matter jurisdiction to determine whether Transamerica was guilty of negligence or breach of fiduciary duty in administering the escrow agreement. If we understand appellant's argument correctly, it is that if a person is a party to a contract, one provision of which allows a prevailing party attorney's fees in any litigation arising out of that contract, the party to that contract may not sue under that provision alone because to do so in some manner fails to consider all the other provisions of the contract and thus would abrogate those other provisions which the court has no jurisdiction to do. To state the proposition is to show its preposterousness. Admittedly, the trial court might err in determining that a party is entitled to attorney's fees, but 'error' and 'jurisdiction' are two wholly separate and distinct concepts, and jurisdiction is not involved in the foregoing situation.

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(2) Transamerica did not join the other party to the escrow instructions in its counterclaim for attorney's fees and such other party was 'indispenable'.

> (3) Since Transamerica's counterclaim did not join the minor beneficiaries of a trust formed by Mr. and Mrs. Cocke, the trial court was without jurisdiction to proceed.

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> (3) Appellant's next argument that the buyers under the escrow instructions were 'indenspensable parties' to Transamerica's counterclaim against appellant is also without merit. Transamerica's claim for attorney's fees arose out of and only out of defending appellant's alleged claim against it. It was appellant and only appellant who caused Transamerica to incur the attorney's fees claimed. In such circumstances neither the buyer nor any other party to the escrow agreement would even be proper parties to Transamerica's claim for attorney's fees, let alone indispensable parties.
>
> For the foregoing reasons we hold the trial court had jurisdiction to determine the issues placed before it." 494 P.2d at 758.

In the case of *Scott v. California Supreme Court*, 426 F.2d 300 (9th Cir. 1970), the court held that where the state court had valid jurisdiction and plaintiff simply lost his case, plaintiff was absolutely precluded from collaterally attacking the judgment of the state court under the guise of the

Civil Rights Act. The Ninth Circuit has also held in Francisco Enterprises, Inc. v. Kirby, 482 F.2d 481 (9th Cir. 1973), that res judicata principals will apply to preclude parties from relitigating constitutional claims in a federal district court subsequent to an adverse judgment on the merits of such claims by a state court of competent jurisdiction.

Petitioner's jurisdictional arguments are without merit and constitute no more than an attempt to relitigate issues already decided in the state courts.

III

Petitioner's action against attorneys Kelly, Tanner and Schneider is frivolous and without merit.

The substance of Petitioner's argument to the District Court is that the Respondents acted in concert to deprive him of his constitutional right to due process. In his complaint Petitioner fails to state anything upon which a cause of action against attorneys Kelly, Tanner and Schneider could be based under the Civil Rights Act. A review of the record demonstrates that Petitioner simply attempts to relitigate issues already tried in state court. It is well settled that the assertion of a violation of Petitioner's rights and a conspiracy cannot be used as a guise to relitigage substantive issues

already adjudicated at the state court level. Francisco Enterprises, Inc. v. Kirby, supra; Morgan v. Sylvester, 125 F.Supp. 380, aff'd. 220 F.2d 758 (2nd Cir. 1955); and, French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970).

Petitioner fails to allege any facts upon which a cause of action could be based under the Civil Rights Act against these attorneys. He merely mentions them as being attorneys for their respective clients.

It is well settled in federal law that activities of a private attorney, in his capacity as a representative for a client, cannot be the basis for a cause of action under the Civil Rights Act. In several cases it has been held that a court-appointed attorney in a criminal proceeding is immune from suit based on a Civil Rights Act because his acts cannot be considered performed under color of law. French v. Corrigan, supra, and Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972). The same rationale has been used to give a court-appointed attorney immunity for his acts in representing a trustee in bankruptcy. Smallwood v. United States, 358 F.Supp. 398 (E.D. Mo. 1973). If a court-appointed attorney can be held immune from a suit under the Civil Rights Act for any activities arising out of his representation of a client it would seem even more rational that a private practitioner should be immune from the same.

Furthermore, with respect to Petitioner's allegations of conspiracy, the District Court found that:

> ". . . .reading the complaint with every intendment in its favor, it fails to demonstrate that the defendants used the courts unequally against him [Petitioner], or that the process was a sham, or that any significant right was denied him [Petitioner] without legal justification. It is not made clear how any one individual acting alone or in conspiracy to accomplish such a result. . . .the complaint does not state a claim under the Civil Rights Act." Scott v. California Supreme Court, 426 F.2d 300 (9th Cir. 1970).

CONCLUSION

For the reasons set forth above, Respondents respectively submit that the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of July, 1975, three copies of the Brief in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner brought a complaint in the Federal District Court attempting to state a cause of action against respondents under the Civil Rights Act. The complaint was clearly a collateral attack upon judgments and orders entered against petitioner in a civil action in the Arizona State Courts. The respondent Judges Cantor, Jacobson and Donofrio, filed a motion to dismiss on the grounds that the Federal District Court was without subject matter jurisdiction, that the State Judges who had acted in their official capacity were immune from monetary damages under the Civil Rights Act and that the complaint failed to state a claim upon which relief could be granted. In the District Court Memorandum Decision and Order which issued March 4, 1974 (Volume II, Appendix to Petition for writ of certiorari, p. 157), the Court denied the motion to dismiss for lack of subject matter jurisdiction, proceeded to the merits of petitioner's

complaint and found it failed to "demonstrate that the defendants used the courts unequally against him, or that the process was a sham, or that any significant right was denied him without legal justification." The motion to dismiss for failure to state a claim upon which relief could be granted and the motion to dismiss on the grounds of judicial immunity were granted. The judgment of the District Court issued that same date dismissing plaintiff's complaint. On appeal to the Ninth Circuit the Court of Appeals affirmed the District Court Judgment on the grounds that the complaint failed to assert a claim upon which relief could be granted.

In requesting this Court to review on writ of certiorari, the petitioner urges the following as reasons for granting the writ:

1. That the Civil Rights Act, 42 U.S.C. §§ 1981-1988 permits a Federal Court to use state

court judgments entered in violation of petitioner's right to due process of law.

2. At least with respect to equitable relief, the doctrine of judicial immunity should not restrict actions under the Civil Rights Act.

Neither of these grounds are viable under the posture of this case. First, the Federal District Court rejected the respondents' argument that the District Court was without subject matter jurisdiction and did in fact review the state court judgments to determine whether they had been entered in violation of petitioner's right to due process of law. Second, the respondent judges did not argue in their motion to dismiss in the District Court nor in their motion to affirm in the Ninth Circuit Court of Appeals that the doctrine of judicial immunity extended to equitable relief under the Civil Rights Act. Their position was that because they acted in

their official capacity they were immune from monetary damages. Thus, petitioner's asserted reasons for granting a writ of certiorari under Rule 19(1)(b), Rules of the United States Supreme Court, are frivolous. In addition, the case does not warrant review by this Court as to any substantive matter. The case is clearly one of a disgruntled state court litigant who has attempted to have the state court judgments reviewed collaterally in the Federal Courts. For these reasons the respondents request that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of July, 1975, three copies of the Response to Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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SUPREME COURT, U. S.

FILED

OCT 30 1975

MICHAEL RODAK, JR., CLERK

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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October 29, 1975

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

Petitioner respectfully moves the Court to vacate its order denying writ of certiorari, entered on October 6, 1975, and to grant the writ. As grounds, petitioner states:

I.

CONFLICTS IN THE APPLICATION OF THE IMMUNITY DOCTRINE

The posture of the case presented here is nearly identical to that presented in Falkner v. Blanton, No. 73-1609, cert den.

October 29, 1974, 42 L.Ed.2d 190, dissenting opinion by Mr. Justice Douglas, with two remarkable exceptions:

1. In the instant case the district court's summary dismissal was with prejudice; and

2. In the instant case the state judges were sued in their personal capacity for proceeding without subject matter jurisdiction, as denying due process.

As Mr. Justice Douglas pointed out in his dissent in Falkner v. Blanton, some courts have distinguished Pierson v. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967), where the relief sought is injunctive. Of course, some district courts dismiss summarily under Pierson if the defendant is a judge. Pierson upholds such dismissal if the judge is being sued for "acts committed within [his] judicial jurisdiction." Pierson, supra, at U.S. 553, 554, L.Ed.2d at 294.

It is respectfully submitted that the Court in deciding Pierson did not intend to overrule those principles stated in Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880), that the act of the judge cannot be merely assumed to be a judicial act.

In Ex parte Virginia the Supreme Court ruled that holding a state office (in that case the office of judge) did not relieve a person of his obligation to obey the Constitution, and further stated at U.S. 348, L.Ed. 680:

> "It was assumed that Judge Cole, in selecting the jury. . .was performing a judicial act. This assumption cannot be admitted. Whether the act done by him was judicial or not is to be determined by its character and not by the character of the agent."
>
> (emphasis added)

Under these principles the allegation that the judge has acted without subject matter jurisdiction must necessarily preclude summary dismissal.

The question here cannot be classed as dissimilar to that posed under the umbrella of official immunity in Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974). The Court there clearly recognized that the district court had erred by assuming that officials had acted within the scope of their duties, and remanded for further proceedings, finding the plaintiffs to be entitled to be heard more fully than was possible on a motion to dismiss.

Lower court decisions and Circuit Court opinions are utterly inconsistent in the application of the Pierson v. Ray pronouncement. In Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974), the plaintiff brought a civil rights action for damages against a justice of the peace, the Arizona district court rendered judgment in favor of plaintiff, and the defendant appealed. The Ninth Circuit held that plaintiff's claim was cognizable under the Civil Rights Act, that judicial immunity does not automatically attach, and that the 9th Circuit must inquire as to whether

the judge acted in the clear absence of all jurisdiction, and at 500 F.2d 63 said:

> "* * *We must also look beyond the status of the party seeking immunity and consider the nature of the conduct for which immunity is sought."

II.

QUESTIONS PRESENTED BY RECENT DECISIONS

Recent decisions of this Court appear to leave unsettled at least three questions concerning conflicts in the application of the doctrine of official immunity or between the doctrine and the actual provisions of the United States Constitution and laws.

INTRODUCTION TO QUESTION 1

In O'Shea v. Littleton, 414 U.S. 488, 503, 38 L.Ed.2d 674, 688, 94 S.Ct. 669 (1974), the Court said:

> "* * *we have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights. Cf. Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress. . . ." Gravel v. United States, 408 U.S. 606, 627, 33 L.Ed.2d 583, 92 S.Ct. 2614 (1972)."

QUESTION 1.

In view of the admitted lack of power under the judicially fashioned doctrine of official immunity to alter or suspend the effect of the criminal laws made by the Congress, upon what constitutional or statutory ground does the judiciary rely for its asserted power to alter or suspend the effect of the civil laws of Congress, such as 42 U.S.C. Section 1983, as in Pierson v. Ray, supra?

As recently as May, 1975 the Court refused "to invade the legislature's province" by altering or suspending the effect of civil laws of Congress governing the award of attorney fees in federal court actions. Alyeska Pipeline Service Co. v. Wilderness Society, 44 L.Ed.2d 141, 161, 95 S.Ct. 1612, 1628 (May 12, 1975).

INTRODUCTION TO QUESTION 2

As pointed out in Lee v. Florida, 392 U.S. 378, 386, 20 L.Ed.2d 1166 1172, 1173, 88 S.Ct. 2096 (1968), under Article VI of the United States Constitution, the Constitution and laws made in pursuance thereof together constitute the supreme law of the land. The Court said:

> "* * *Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State [are] bound . . . ."

Article IV of the Constitution gives Congress the power to prescribe by general laws, such as 42 U.S.C. Sections 1981-1988,

the effect of state laws and judicial proceedings.

In Scheuer v. Rhodes, 416 U.S. 232, 237, 40 L.Ed.2d 90, 97, 94 S.Ct. 1683 (1974), the Court affirmed the doctrine of Ex parte Young, 209 U.S. 123, 159, 160, 52 L.Ed. 714, 729, 28 S.Ct. 441 (1908), which held that when a state officer, such as a judge, violates the Federal Constitution in acting as a state official he is in that case stripped of his official character and subjected in his person to the consequences of his individual conduct, and the State has no power to impart to such person any immunity against the supreme law and authority of the United States.

QUESTION 2.

Since the affirmance of the Ex parte Young doctrine, upon what constitutional or statutory ground does the judiciary now rely for the power earlier asserted in Pierson v. Ray, supra, to (1) grant official immunity to a person stripped of his official character, and (2) to grant immunity against the United States Constitution by granting immunity against enforcement of laws specifically made for the purpose of enforcing constitutional provisions, such as 42 U.S.C. Sections 1981-1988?

In Ex parte Virginia, supra, at 100 U.S. 348, 25 L.Ed. 680, the Court said:

> "We do not perceive how holding an office under a State, and claiming to act for the State, can relieve the holder from obligation to obey the Constitution of the United States, or take away the power of

> Congress to punish his disobedience.
>
> "* * *Whether he was a county judge or not is of no importance.* * *"

INTRODUCTION TO QUESTION 3

In Lee v. Florida, supra, the judicial department recognized that under Article VI the supreme law and authority of the United States is the Constitution and laws made in pursuance thereof.

Under the last clause of Article I, Section 8, Congress has the power to make all laws necessary and proper to carry into execution all powers vested by the Constitution in the judicial department or officer thereof.

QUESTION 3.

In view of Article I, Section 1 and the last clause of Section 8, and Article VI, upon what constitutional or statutory provision does the judiciary now base its earlier asserted power to carry into execution and so into effect a judgment which would alter or suspend the effect of any provision of 42 U.S.C. Section 1981-1988, such as Pierson v. Ray, supra?

CONCLUSION

Petitioner respectfully submits that answers to the above questions are necessary for a full and proper understanding by the people of the practical availability of the civil rights secured to them on paper by the United States Constitution and laws.

For the above reasons, Petitioner prays the Court to vacate its order denying the writ of certiorari and to grant the writ.

Respectfully submitted this

29th day of October, 1975.

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CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for purposes of delay and is restricted to the grounds specified in Rule 58(2).

Richard Anthony Johnson
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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 1975, three copies of the Petition for Rehearing on Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

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